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# UTAH'S GRAND STAIRCASE: THE RIGHT PATH TO WILDERNESS PRESERVATION?

JAMES R. RASBAND\*

## INTRODUCTION

On September 18, 1996, President Clinton stood at the South Rim of the Grand Canyon in Arizona and exercised his broad authority under the Antiquities Act<sup>1</sup> to set aside 1.7 million acres of public land, northward in Utah, as the Grand Staircase-Escalante National Monument ("the Monument" or "Grand Staircase").<sup>2</sup> Securely separated from Utah by the wondrous

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1. 16 U.S.C. § 431 (1994). Section 2 of the Antiquities Act delegates broad authority to the President to create national monuments:

The President of the United States is authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected.

*Id.*

2. See Proclamation No. 6920, 61 Fed. Reg. 50,223 (1996). The Monument takes the first part of its name from "a vast geologic stairway, named the Grand Staircase by pioneering geologist Clarence Dutton, which rises 5,500 feet to the rim of Bryce Canyon in an unbroken sequence of great cliffs and plateaus." *Id.* The latter portion of the name reflects the inclusion, in the northeastern reaches of the Monument, of the Escalante Canyons area, which includes "several major arches and natural bridges" and "narrow, serpentine canyons, where erosion has exposed sandstone and shale deposits in shades of red, maroon, chocolate, tan, gray, and white." *Id.* The Monument also includes "the upper Paria Canyon system, major components of the White and Vermilion Cliffs, the Kaiparowits Plateau," and "the spectacular Circle Cliffs and part of the Waterpocket Fold." *Id.* A visit to the Monument leaves little question that this magnificent part of the Colorado Plateau, or at least major portions of it, are worthy of monument designation and preservation. *But see infra* note 154 (questioning whether the Kaiparowits is worthy of designation). For a thorough examination of the Monument's resources and a description of the physical setting of the Monument, see VISIONS OF THE GRAND STAIRCASE-ESCALANTE: EXAMINING UTAH'S NEWEST NATIONAL MONUMENT 3-40 (Robert B. Keiter et al. eds., 1998) [hereinafter VISIONS OF THE GRAND STAIRCASE].

chasm and the forbidding Kaibab Plateau beyond,<sup>3</sup> the President was subjected to heavy criticism by a furious Utah congressional delegation, none of which attended the event.<sup>4</sup> The delegation, which had only learned of the President's intentions in a *Washington Post* story eleven days before the proclamation,<sup>5</sup> described the President's action as a shameful and arrogant act of political opportunism and cried foul over the Clinton Administration's failure to consult it or give any public notice of

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3. A spokesperson for the Clinton Administration acknowledged that the President chose to announce his decision in Arizona rather than Utah in part because of his view (which proved correct) that he had a better chance of garnering Arizona's electoral votes than Utah's. See *It's All About Politics*, SALT LAKE TRIB., Sept. 18, 1996, at A6; see also *infra* note 126 (discussing this political calculation); *infra* note 134 (discussing other reasons for holding the announcement ceremony in Arizona).

4. See Jim Woolf, *A Pretty, Great Monument?*, SALT LAKE TRIB., Sept. 19, 1996, at A1 (comments of Sen. Hatch); Lee Davidson, *Green Light for Proposal Has Utahns Seeing Red*, DESERET NEWS, Sept. 18, 1996, at A1. Even the delegation's lone Democrat, Representative Bill Orton, said of the President's action: "I think it is a monument to political blunders and is unwise, unneeded and premature." Davidson, *supra*, at A1; see also Laurie Sullivan Maddox, *It's a Monumental Day for Utah*, SALT LAKE TRIB., Sept. 18, 1996, at A1 [hereinafter Maddox, *A Monumental Day*] (quoting Rep. Bill Orton: "[S]hame on [President Clinton]"). In the end, Orton may have paid the price for the President's decision with his congressional seat. In the November 1996 congressional elections, he garnered only half as many votes in Kane and Garfield counties, where the Monument is situated, as he had in 1994. Compare UTAH OFFICE OF LT. GOV./SEC. OF STATE, STATE OF UTAH GENERAL ELECTIONS 1994, at S7875-1 (1995) (47.39% of vote in Garfield County; 53.07% of vote in Kane County), with UTAH OFFICE OF LT. GOV./SEC. OF STATE, STATE OF UTAH GENERAL ELECTIONS 1996, at S7875-1 (1996) (23.67% of vote in Garfield County; 27.96% of vote in Kane County). See also Dennis Romboy, *Computer Shutdown Added to Nail-Biting in Cannon-Orton Race*, DESERET NEWS, Nov. 6, 1996, at A9. Apparently, this result was foreseen by the Clinton Administration. See Laurie Sullivan Maddox, *Taking Swipes at Clinton, Utahns Vow to Fight Back*, SALT LAKE TRIB., Sept. 19, 1996, at A5 [hereinafter Maddox, *Taking Swipes*] ("Talk among the Utah delegation was that administration officials had acknowledged the move may cost Democrats their only House seat in the state—Orton's—but that they considered him expendable.").

5. See *Prepared Statement of Senator Robert F. Bennett Before the House Resources Committee National Parks and Public Lands Subcommittee Oversight Hearing on the Creation of the Grand Staircase-Escalante National Monument*, FED. NEWS SERV., Apr. 29, 1997; Tom Kenworthy, *President Considers Carving National Monument out of Utah Land*, WASH. POST, Sept. 7, 1996, at A3 (breaking the Monument story); see also 143 CONG. REC. H8398, H8399 (daily ed. Oct. 6, 1997) (statement of Rep. Hansen); *id.* at H8411 (statement of Rep. Schaffer of Colorado noting that although President Clinton refused to consult with the Utah delegation, he did consult with Colorado Governor Roy Romer, current chairman of the Democratic National Committee, and Robert Redford, an actor and environmental activist).

the proposal.<sup>6</sup> Residents of Kane and Garfield counties, the southern Utah counties within which the Monument is located, were even less kind. They hung President Clinton and Interior Secretary Bruce Babbitt in effigy and subjected them to vituperative criticism.<sup>7</sup> In the counties' view, the proclamation was an illegal expansion of the Antiquities Act. They also claimed it would destroy the last hope for good wages in the area, which was, they said, poised for a boom because of vast, low-sulphur coal reserves within the Monument.<sup>8</sup> Not all Utahns, of course, were so angry. Many supported the Monument.<sup>9</sup> And

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6. See Maddox, *Taking Swipes*, *supra* note 4, at A5 (quoting statement of Sen. Hatch of Utah that "[i]n all my 20 years in the U.S. Senate, I have never seen a clearer example of the arrogance of federal power . . . . Indeed, this is the mother of all land grabs"); see also Christopher Rosche, *Bennett: Papers Prove Clinton 'Misled' Utahns*, SALT LAKE TRIB., June 24, 1997, at A4 (describing Sen. Bennett's argument that documents proved that the President's "overriding motive" in creating the Monument "was to boost [his] re-election chances"). Politicians from other states joined in the chorus. See Maddox, *Taking Swipes*, *supra* note 4, at A5 (Sen. Burns of Montana said the proclamation was the act of a "tyrant" and Sen. Craig of Idaho called it a "phenomenal misuse of power").

7. See, e.g., Paul Larmer, *Beauty and the Beast*, HIGH COUNTRY NEWS, Apr. 14, 1997, at 1 (quoting Kane County Commissioner's statement that "[i]t was arrogant as hell for the president to use the law to his advantage as he did"); Maddox, *A Monumental Day*, *supra* note 4, at A1 (describing "loss of rights" rally held in Kane County on the day of the Monument's designation); Woolf, *supra* note 4, at A4 (quoting a Kanab resident: "What I'd like to do is declare war on the White House . . . but my church and the laws don't allow me to do that."); *Kane County Holds a Bitter Wake After Monument Decision*, SALT LAKE TRIB., Sept. 19, 1996, at A7; David Maraniss, *Clinton Acts to Protect Utah Land*, WASH. POST, Sept. 19, 1996, at A1 (quoting executive director of the Utah Association of Local Governments as saying "[t]his is the most arrogant gesture I have seen in my lifetime . . . . The only comparable act I can think of is when a country is ruled by a king and he sweeps his hand across a map and says, 'It will be thus!'").

8. In the early 1990's Kanab, the largest town in Kane County, lost some 500 timber and uranium jobs. See Larmer, *supra* note 7, at 1.

Families that had a primary bread winner earning \$20 to \$30 an hour suddenly had to move or change occupations. Those who wanted to stay had to send Dad to work as a trucker or laborer in a distant city and add Mom, grandma and the kids to the work force, most often cleaning hotel rooms and flipping hamburgers for tourists at \$5 an hour.

*Id.* The local hope was that the relatively high-wage timber and uranium jobs would be replaced by mining jobs from the land owned by Andalex on the Kaiparowits Plateau. See *id.*; see also *infra* notes 180-93 and accompanying text (discussing Andalex's proposed mine).

9. Compare Bob Bernick, Jr., *52% Oppose Monument*, DESERET NEWS, Oct. 20, 1996, at A1 (poll showing 19% strongly favoring, 18% somewhat favoring, 20% somewhat opposing, 32% strongly opposing the Monument, and 12% not knowing), with *Time Softens Opposition to Monument*, SALT LAKE TRIB., May 16, 1997, at C1 (poll showing decrease from 47% to 32% of Utahns opposed to the Monument).

wilderness advocates were almost as hyperbolic in their praise of President Clinton as the counties were in their criticism.<sup>10</sup>

Two years later, the angry rhetoric over the Grand Staircase-Escalante National Monument continues to reverberate in Utah, in the federal courts, and in Congress. Six bills proposing to amend or repeal the Antiquities Act have been offered in Congress.<sup>11</sup> Three lawsuits have been filed challenging the President's authority to create the Monument.<sup>12</sup> And despite the language in the proclamation protecting "valid existing rights," environmental organizations have aggressively disputed access to and use of federally leased land and non-federal inholdings within the Monument.<sup>13</sup> What casual observers may not realize is that this polarized dispute over the Monument is only the latest skirmish in a lengthy and acrimonious battle over how much of the spectacular canyons and plateaus of Utah's red rock country should be preserved as national monuments, national parks, and wilderness areas.<sup>14</sup>

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10. See, e.g., Woolf, *supra* note 4, at A1 (quoting Ken Rait of the Southern Utah Wilderness Alliance that, by designating the Monument, Clinton had "joined the ranks of the greatest conservation leaders in U.S. history"). Compare Woolf, *supra* note 4 (quoting Vice-President Gore's praise of President Clinton: "The reason [the Antiquities Act] hasn't always been used is, let's face it, it takes courage to take a step like this. It takes guts."), with *infra* note 85 and accompanying text (noting that presidents have used the Antiquities Act 102 times). Two days before the Monument was declared, environmental groups took out a full-page advertisement in the *New York Times* urging readers to call the White House in support of creating the Monument. See Maddox, *A Monumental Day*, *supra* note 4, at A1.

11. See *infra* Part II.D (discussing these bills).

12. The Utah School and Institutional Trust Lands Administration filed a lawsuit in federal court on June 23, 1997. See Jim Woolf, *Utah's Monument's Size Prompts New Lawsuit*, SALT LAKE TRIB., June 23, 1997, at A1; see also *infra* note 148 (citing district court filings). On that same day, the Utah Association of Counties filed a lawsuit seeking to overturn the Monument designation. See Woolf, *supra* note 4, at A1. Earlier, in October 1996, a lawsuit challenging the President's creation of the Monument had been filed by the Western States Coalition and the Mountain States Legal Foundation. See *id.* That suit was refiled by the Mountain States Legal Foundation on November 5, 1997. See *Mountain States Legal Found. v. Clinton*, No. 97CV 0863G (D. Utah filed Nov. 5, 1997). The suit of the Utah School and Institutional Trust Lands Administration has subsequently been settled as part of a land exchange worked out by Interior Secretary Babbitt and Utah Governor Leavitt. See *infra* Part II.C (discussing this land exchange).

13. See *infra* Part II.B.

14. See *infra* Part I (discussing this history). The beauty, vitality, and severity of Utah's red rock country, and the Colorado Plateau within which it is situated, is as hard to capture in words as the feelings of solitude, awe, and foreboding it inspires. For evocative descriptions of the area, see WALLACE STEGNER, *BEYOND THE HUNDREDTH MERIDIAN* 172-73 (1954) (quoting C.E. DUTTON, 2 *THE TERTIARY*

With all of the focus on the Grand Staircase, it seems an opportune time to review the course of Utah's red rock wilderness war and propose some fixed stars that should guide withdrawal<sup>15</sup> decisions in the future. To that end, this article first reviews the long-running Utah wilderness debate to elucidate the broader context for the anger generated by the designation of the Grand Staircase-Escalante National Monument. Using the Grand Staircase controversy as a departure point, the article then suggests that for future withdrawal decisions to maintain their ennobling quality, a different process is necessary. This insight comes from wilderness literature.

The consistent message of wilderness literature, as revealed in the philosophical writings of Henry David Thoreau, John Muir, Aldo Leopold, Joseph Sax, and other preservationists, as well as in the recreational writing of anglers, mountaineers, and hunters, is that adherence to certain virtues in our interaction with wilderness redeems and ennobles us. As Joseph Sax explained in his thoughtful book *Mountains Without Handrails*,<sup>16</sup> preservationists "are really moralists at heart, and people are very much at the center of their concerns. They encourage people to immerse themselves in natural settings and to behave there in certain ways, because they believe such behavior is redeeming."<sup>17</sup> This article concludes that the basic "redeeming" virtues articulated in wilderness literature—virtues like sportsmanship, restraint, deliberation, sensitivity to impact, and patient woodcraft—are also the fixed stars that should guide withdrawal

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HISTORY OF THE GRAND CANYON DISTRICT, UNITED STATES GEOLOGICAL SURVEY MONOGRAPHS 58-59 (1882)); WALLACE STEGNER, *THE SOUND OF MOUNTAIN WATER* 131-36 (1980); TESTIMONY: WRITERS OF THE WEST SPEAK ON BEHALF OF UTAH WILDERNESS (compiled by Stephen Trimble & Terry Tempest Williams, 1996); EDWARD ABBEY, *DESERT SOLITAIRE* (1988); CRAIG L. CHILDS, *STONE DESERT: A NATURALIST'S EXPLORATION OF CANYONLANDS NATIONAL PARK* (1995).

15. The term "withdrawal" refers to actions taken by Congress or the executive branch to set aside an area of federal land otherwise available for settlement, sale, location, or entry under the public land laws, in order to maintain other public values in the area or to reserve the area for a particular purpose or program. See 43 U.S.C. § 1702(j) (1994) (Federal Land Policy Management Act's definition of "withdrawal").

16. JOSEPH L. SAX, *MOUNTAINS WITHOUT HANDRAILS: REFLECTIONS ON THE NATIONAL PARKS* (1980).

17. *Id.* at 103; see also *id.* at 15 (describing the preservationist as "a prophet for a kind of secular religion"); *id.* at 17 ("The early preservationists and park advocates assumed, without ever explaining, that personal engagement with nature would build in the individual those qualities of character that the existence of parks symbolized for us collectively.").

decisions and, more generally, preservation advocacy. In essence, the same virtues that govern our interaction with wilderness should govern our acquisition of wilderness. In the end, it is not enough simply to have "bagged" the Grand Staircase, any more than it is sufficient simply to bag a deer, net a fish, run a river, or scale a mountain; it is the manner by which the result is achieved that ultimately ennobles or devalues the withdrawal. The sad irony of the Grand Staircase designation process is that we value wilderness and the Monument for their ability to develop within us the very virtues that the Clinton Administration seemed to ignore in securing the Monument.

Having developed the applicability of wilderness virtues to the project of wilderness acquisition, this article suggests how the Antiquities Act could be amended to reflect those virtues. Finally, it concludes that regardless whether the law is changed, voluntary adherence to wilderness virtues in the withdrawal process should be part of a preservation advocacy ethic.

## I. THE RED ROCK WILDERNESS WAR IN UTAH

### A. *Previous Withdrawals of Public Land Within Utah*

Federal withdrawal and reservation of land from the public domain is not new to Utah. Almost sixty-four percent of Utah, some 33.6 million acres, is owned by the federal government and managed by its constituent agencies.<sup>18</sup> Of that acreage, approximately twenty-two million acres are managed by the Bureau of Land Management ("BLM"),<sup>19</sup> a portion of which were withdrawn for the Monument. The remaining acreage was previously withdrawn in the form of six additional national monuments (Cedar Breaks, Hovenweep, Timpanogos Cave, Dinosaur, Rainbow Bridge, and Natural Bridges),<sup>20</sup> six national forests

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18. See GEORGE C. COGGINS ET AL., *FEDERAL PUBLIC LAND AND RESOURCES LAW* 14 (3d ed. 1993).

19. See 45 Fed. Reg. 75,602, 75,605 (1980) (noting that the BLM administers 22,075,916 acres of public lands within the State of Utah). The BLM was created in 1946 by the merger of the Federal Grazing Service and the General Land Office. See COGGINS ET AL., *supra* note 18, at 138. For an overview of the administrative structure of the BLM, see GEORGE C. COGGINS & ROBERT L. GLICKSMAN, *PUBLIC NATURAL RESOURCES LAW* § 7.02[2][e] (1997).

20. Cedar Breaks, Proclamation No. 2054, 48 Stat. 1705 (1933) (boundary adjusted by Act of Mar. 7, 1942, 56 Stat. 141 and Act of June 30, 1961, 75 Stat. 198 (now 6,154 acres)); Hovenweep, Proclamation No. 1654, 42 Stat. 2299 (1923)

(Ashley, Dixie, Fishlake, Manti-LaSal, Uinta, and Wasatch-Cache),<sup>21</sup> five national parks (Arches, Bryce Canyon, Canyonlands, Capitol Reef, and Zion), two national recreation areas (Glen Canyon and Flaming Gorge), and one national historic area (Golden Spike, celebrating the joining of the first transcontinental railway).<sup>22</sup>

Even the Grand Staircase-Escalante National Monument is not a wholly new idea. In the 1930s, Harold Ickes, Secretary of the Interior under President Franklin Roosevelt, proposed that a 4.4 million acre area of Utah's red rock country be withdrawn as the Escalante National Monument.<sup>23</sup> In part because of local opposition, the proposed monument, named after Father Escalante, the Spanish priest who first explored the region,<sup>24</sup> was eventually shelved by the Roosevelt Administration.<sup>25</sup> The seed

(enlarged by Proclamation No. 2924, 65 Stat. c8 (1951); Proclamation No. 2998, 67 Stat. c21 (1952); and Proclamation No. 3132, 70 Stat. c26 (1956) (now 784.93 acres in Utah and Colorado)); Timpanogos Cave, Proclamation No. 1640, 42 Stat. 2285 (1922) (250 acres); Dinosaur, Proclamation No. 1313, 39 Stat. 1752 (1915) (enlarged by Proclamation No. 2290, 53 Stat. 2454 (1938); Act of Sept. 8, 1960, 74 Stat. 857; Notice of the Secretary of the Interior, Feb. 21, 1963, Mar. 27, 1964; Notice of the Asst. Secretary of the Interior, Oct. 6, 1964; and Notice of the Dir. of the National Park Service, Aug. 27, 1985 (now 204,355.49 acres in Utah and Colorado)); Rainbow Bridge, Proclamation No. 1043, 36 Stat. 2703 (1910) (160 acres); Natural Bridges, Proclamation No. 804, 35 Stat. 2183 (1908) (boundary enlarged by Proclamation No. 881, 36 Stat. 2502 (1909); Proclamation No. 1323, 39 Stat. 1764 (1916); and Proclamation No. 3486, 76 Stat. 1495 (1962) (now 7,636.49 acres)).

21. See *USDA Forest Service: Utah National Forests* (visited Oct. 7, 1998) <<http://www.fs.fed.us/recreation/states/ut.html>> (listing acreage within Utah's national forests).

22. See, e.g., Jim Woolf, *Monument: Utah Decision Expected Soon*, SALT LAKE TRIB., Sept. 10, 1996, at A1; Todd Wilkinson, *A Monumental Challenge: Controversy over Pres. Bill Clinton's Creation of Utah's Grand Staircase-Escalante into a National Monument*, 71 NAT'L PARKS 28 (1997); see also *Designation of National Park System Units* (visited Oct. 7, 1998) <<http://www.nps.gov/legacy/nomenclature.html#nparks>> (listing Parks, Recreation Areas, and Historical Areas).

23. See Elmo R. Richardson, *Federal Park Policy in Utah: The Escalante National Monument Controversy of 1935-1940*, 33 UTAH HIST. Q. 109 (1965); see also Christopher Smith, *Grand Staircase National Monument: It's a New Name—But an Old Idea*, SALT LAKE TRIB., Oct. 6, 1996, at A1.

24. See Richardson, *supra* note 23, at 114. See generally HERBERT E. BOULTON, *PAGEANT IN THE WILDERNESS* (Utah State Hist. Society 1950) (translated and annotated diary and itinerary of Father Escalante).

25. Initially, graziers raised the most objections to the proposed monument. See Richardson, *supra* note 23, at 114-16 ("This is just a little harder rap than we can take without putting up a battle," a stockman concluded, "You can make it legal but you can never make it moral."). Later, state officials voiced objection because they wanted the state to retain jurisdiction over the lands and they feared that the monument would limit development of dams along the Green and Colorado rivers,



planted by Secretary Ickes, however, ultimately bore fruit. Much of the area intended as the Escalante National Monument was set aside as Canyonlands National Park and the Glen Canyon National Recreation Area,<sup>26</sup> and the new monument set aside by President Clinton now bears the name Secretary Ickes proposed.

Although the Antiquities Act ("the Act") was not employed to circumvent local opposition to the original Escalante National Monument proposal, use of the Act is certainly not a novelty in Utah. Of the national parks in Utah, all except Canyonlands started as national monuments.<sup>27</sup> And, although not every designation drew criticism,<sup>28</sup> the sort of censure that occurred with the Grand Staircase designation had been heard before. In January 1969, just ninety minutes before he was to leave office, President Lyndon Johnson signed Antiquities Act proclamations adding some 264,000 acres to Arches and Capitol Reef National Monuments.<sup>29</sup> The reaction in Utah was frustration and

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which they believed were necessary for future development of the region. *See id.* at 118. Unwilling to snub fellow Democrats in Utah, for several years, the Interior Department wrestled with Utah officials over these issues. *See id.* at 119-33. When America entered World War II, support shifted in favor of developing dams along the Colorado and Green rivers. In March 1942, Secretary Ickes wrote Utah's new governor, Democrat Herbert Maw, of the Administration's decision to support such dams and the Escalante National Monument idea was dead, at least for a time. *See id.* at 132-33.

26. *See* Richardson, *supra* note 23, at 115 (map of proposed Escalante National Monument); *see also* Canyonlands National Park Act of 1964, Pub. L. No. 88-590, 78 Stat. 934; Glen Canyon National Recreation Area Act of 1972, Pub. L. No. 92-593, 86 Stat. 1311.

27. *See* Proclamation No. 2246, 50 Stat. 1856 (1937) (Capitol Reef) (boundary enlarged by Proclamation No. 3249, 72 Stat. c48 (1958) and Proclamation No. 3888, 83 Stat. 922 (1969)); Proclamation No. 1875, 46 Stat. 2988 (1929) (Arches) (boundary enlarged by Proclamation No. 2312, 53 Stat. 2504 (1938); Proclamation No. 3360, 74 Stat. c.79 (1960); and Proclamation No. 3887, 83 Stat. 920 (1969)); Proclamation No. 1664, 43 Stat. 1914 (1923) (Bryce Canyon); Proclamation No. 877, 36 Stat. 2498 (1909) (Mukuntuweap) (name changed to Zion and boundary enlarged by Proclamation No. 1435, 40 Stat. 1760 (1918)). Utahns now seem to regard the state's national parks as the state's crown jewels, *see infra* note 33, and it seems likely that the Grand Staircase eventually will be looked upon with similar pride.

28. Interestingly enough, a review of Utah's major newspapers at the time of the earlier designations reveals nothing like the protest that greeted the Grand Staircase designation. If anything is notable, it is that the designations drew so little attention. *See, e.g., Utah Given Another National Monument*, DESERET NEWS, Apr. 23, 1929, at 1 (three brief paragraphs on Arches); *President Passes Two Monuments in Southern Utah*, SALT LAKE TRIB., Apr. 23, 1929, at 1 (two paragraphs on Arches).

29. *See* Proclamation No. 3887, 83 Stat. 920 (1969) (adding 48,943 acres to Arches); Proclamation No. 3888, 83 Stat. 922 (1969) (adding 215,056 acres to Capitol Reef); *see also* Gordon Eliot White, *Johnson Enlarges Arches, Capitol Reef*, DESERET

anger that now has a familiar sound. Senator Wallace F. Bennett, the father of Utah's current Senator Robert Bennett, criticized the expansions with language similar to that which his son would later use to criticize the Grand Staircase, arguing that the proclamations were a "last gasp attempt to embalm a little more land in the West," and protesting that the actions were "arbitrary" and "unilateral . . . with no notice whatsoever, without hearing any interested group, without prior consultation with Congress and without consultation or discussion with state officials."<sup>30</sup> Other Utahns of both political parties joined in this criticism of the surreptitious manner in which the monuments had been enlarged.<sup>31</sup> Nearby communities and other interests that relied on the public lands for their livelihoods were particularly upset.<sup>32</sup> Eventually the criticism died down, and the

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NEWS, Jan. 20, 1969, at B1 (reporting on the designation); *LBJ Proclamations Enlarge Two of Utah's Monuments*, SALT LAKE TRIB., Jan. 21, 1969, § 2, at 13 (same).

30. Gordon Eliot White, *Hearings Due on Land Plan*, DESERET NEWS, Jan. 22, 1969, at B1; see also *Bennett Blasts LBJ 'Land Grab' to Expand 2 Monuments in Utah*, SALT LAKE TRIB., Jan. 22, 1969, § 2, at 17 (reporting additional criticism). Compare *id.*, with Frank Clifford & Paul Richter, *Utah Officials Oppose U.S. Plan for Land*, L.A. TIMES, Sept. 18, 1996, at A3 (reporting statement of Sen. Robert Bennett that the Grand Staircase designation was "the height of arrogance," and also reporting the statement of the spokeswoman for Sen. Bennett that "[t]he president is attempting to establish the largest national monument in the lower 48 states by administrative fiat without any consultation with the Congress or the people directly affected").

31. See *Park Fiat Draws Fire*, DESERET NEWS, Jan. 18, 1969, at B1 (reporting criticism of the manner in which the monuments were expanded by Democrats Governor Calvin Rampton and Sen. Frank Moss as well as Republican Sen. Bennett and Congressman Laurence Burton); see also Frank Brunsman, *Utahns Respond Speedily, Critically to Enlargement of 2 Monuments*, SALT LAKE TRIB., Jan. 26, 1969, at B4 (reporting on Utah officials' criticisms of the proclamations); *Bennett Blasts LBJ 'Land Grab' to Expand 2 Monuments in Utah*, *supra* note 30, § 2, at 17 (same); Gordon Eliot White, *LBJ's Last 'Great Society' Effort*, DESERET NEWS, Jan. 21, 1969, at A11 (noting that "the secrecy the administration sought to impose was intense" and that "little or no regard was taken of the 31,200 acres of state land involved"); Editorial, *Hold Park Hearings*, DESERET NEWS, Jan. 21, 1969, at A10 (critical editorial); Editorial, *Mr. Johnson's Arbitrary Land Grab*, SALT LAKE TRIB., Jan. 22, 1969, § 1, at 14 (critical editorial). But see *For More Annexation*, SALT LAKE TRIB., Feb. 5, 1969, at A12 (noting that conservationists were pleased with the proclamations).

32. See *Utah Town Labels Capitol Reef Monument Addition Its "Death Certificate"*, SALT LAKE TRIB., Jan. 24, 1969, at C12 (arguing that the expansion of Capitol Reef would devastate the Boulder economy which was built primarily on cattle ranching); see also Barbara Springer, *LBJ's "Last-Minute" Action Angers Miners, Stockmen*, SALT LAKE TRIB., Jan. 21, 1969, § 2, at 13 ("Representatives of Utah mining, cattle and sheep industries Monday expressed indignation and disbelief . . ."); *id.* (quoting president of the Utah Cattlemen's Association: "We'd

expanded Capitol Reef and Arches National Parks are now among the crown jewels of Utah's tourism industry,<sup>33</sup> but the embers of resentment toward unilateral federal preservation efforts continued to smolder.

*B. FLPMA and the Inventory of Utah Wilderness Areas*

The controversy over withdrawal and management of Utah's red rock country heated up again in 1976 with the passage of the Federal Land Policy and Management Act ("FLPMA"),<sup>34</sup> and it has remained intense since that time. Section 603 of FLPMA directed the BLM to inventory roadless areas of 5000 acres or more on the public lands and assess whether they had wilderness characteristics as described in the Wilderness Act.<sup>35</sup> Areas with such wilderness characteristics were to be identified as

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rather go down fighting than lying on our backs."); Douglas Christensen, *Meeting Opposes Land Withdrawals*, DESERET NEWS, Feb. 5, 1969, at A9 (reporting the statement of Garfield County Commissioner Dale Marsh despairing that if the proclamation was not rescinded, "[r]oad development in the area will stop; existing roads and trails within the areas' boundaries will be blocked; oil and gas development will stop; grazing rights will be terminated; mining operations will stop; watershed and soil conservation will stop; logging and lumbering will stop; hunting and recreational expansion will stop").

33. See Tom Wharton, *Utah's National Parks, Monuments, Recreation Areas Offer Diversity*, SALT LAKE TRIB., May 18, 1997, at L8 ("Arches, Canyonlands, Capitol Reef, Bryce Canyon, and Zion . . . are the crown jewels of Utah's tourism industry, drawing thousands of visitors to southern Utah from all parts of the world.").

34. 43 U.S.C. §§ 1701-1784 (1994 & Supp. II 1996). FLPMA is the primary governing statute for the public lands under the jurisdiction of the BLM.

35. *Id.* § 1782(a) ("Within fifteen years after Oct. 21, 1976, the Secretary shall review those roadless areas of five thousand acres or more and roadless islands of the public lands, identified during the inventory required by section 1711(a) of this title as having wilderness characteristics described in the Wilderness Act . . ."). The Wilderness Act defines wilderness, in significant part, as:

[A]n area of underdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, which is protected and managed so as to preserve its natural conditions and which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least five thousand acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.

16 U.S.C. § 1131(c) (1994). For an overview of wilderness issues and the Wilderness Act, see MICHAEL FROME, *BATTLE FOR THE WILDERNESS* (1997).

Wilderness Study Areas ("WSAs").<sup>36</sup> Once the inventory was complete, the BLM was to conduct a study of each WSA, including a mineral survey,<sup>37</sup> to determine and recommend to the President, and the President in turn to recommend to Congress, whether any of the WSAs should be designated as wilderness.<sup>38</sup>

Pending a final decision on wilderness status by Congress, FLPMA requires the BLM to manage the WSAs so as not to impair their suitability for preservation as wilderness, whereas land not so designated is to be managed under multiple use principles.<sup>39</sup> It was for this reason that the BLM's inventory attracted significant interest in Utah, where BLM lands comprise over forty percent of the state.<sup>40</sup>

As a result of its section 603 inventory, the BLM originally designated 2,959,696 acres as WSAs.<sup>41</sup> Dismayed by what they viewed as the intolerably small percentage of the twenty-two million acres of BLM land identified from the inventory as WSAs, conservation groups contended that the BLM's work was not really an inventory at all, but instead an improper effort to zone vast tracts of BLM land for resource exploration and

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36. See *supra* note 35; see also U.S. DEPT OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, WILDERNESS INVENTORY HANDBOOK 10-14 (1978). The inventory process was to occur in two primary steps: an initial inventory to identify within each state wilderness inventory units of roadless areas, and then an intensive inventory to determine whether each unit met the wilderness characteristics criteria required for a WSA. See *id.* Both the initial and intensive inventories were to be conducted by BLM district managers, following which there was to be a public comment period and then a final decision by the BLM State Director identifying the WSAs on the public lands. See *id.* at 10-11, 14-15.

37. See *supra* note 35; see also 43 U.S.C. § 1782(a) (1994) ("[P]rior to any recommendations for the designation of an area as wilderness the Secretary shall cause mineral surveys to be conducted by the United States Geological Survey and the United States Bureau of Mines to determine the mineral values, if any, that may be present in such areas.").

38. See *supra* note 35.

39. See 43 U.S.C. § 1782(c) (1994). "[E]xisting mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on [the date of approval of this Act]" were, however, allowed to continue "[p]rovided, that, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." *Id.*; see also 43 U.S.C. § 1712(c)(1) (1994) (providing for multiple use of areas not designated as WSAs).

40. See WILDERNESS AT THE EDGE 34 (The Utah Wilderness Coalition ed., 1990); see also 45 Fed. Reg. 75,602, 75,605 (1980) (noting that the BLM administers 22,075,916 acres of public lands within the State of Utah).

41. See 45 Fed. Reg. 75,602, 75,605 (1980) (publishing final inventory decision). The total acreage figure included 248,048 acres of land that had been identified as a primitive or natural area prior to the passage of FLPMA. See *id.*

development.<sup>42</sup> They contended that in many cases roadless areas excluded from WSA designation conveniently coincided with the presence of coal and other mineral deposits.<sup>43</sup> The conservation groups' subsequent efforts to increase the number of WSAs and the acreage available for wilderness designation is one of the real success stories of wilderness advocacy.

Led by the Utah Wilderness Association, several conservation groups formally protested the inventory to the BLM and, when that was largely unsuccessful,<sup>44</sup> appealed the BLM's decision to the Interior Board of Land Appeals ("IBLA").<sup>45</sup> In what was the largest IBLA appeal of its kind, they argued that approximately 925,000 acres had been improperly excluded from consideration as wilderness.<sup>46</sup> In a resounding victory for the conservation groups, the IBLA reversed the BLM on two units involving 16,310 acres and remanded to the BLM for further inventory nineteen units totaling over 800,000 acres.<sup>47</sup> On remand, the BLM determined that over 538,000 additional acres exhibited wilderness characteristics and should be accorded WSA status. Conservation groups then appealed again, arguing that 250,000

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42. See Ray Wheeler, *The BLM Wilderness Review*, in WILDERNESS AT THE EDGE 34, 34-39 (The Utah Wilderness Coalition ed., 1990).

43. See *id.* at 38.

44. The BLM did add additional acreage in eight of the WSAs protested by conservation groups, although that was partially offset by dropping WSA status for two units to which protests had been lodged by individuals. See Decision on Protests to State Director's November 14, 1980 Decisions on Statewide Inventory, 46 Fed. Reg. 15,332, 15,334 (1981).

45. See Utah Wilderness Ass'n, 72 I.B.L.A. 125 (1983). In addition to the Utah Wilderness Association, 13 other organizations appealed. See *id.* at 126 n.1. Seven interveners, including the State of Utah, supported the BLM's position. See *id.* at 127 n.2. The appeal to the IBLA had, of course, been preceded by a protest to the BLM's Utah Office. See 46 Fed. Reg. 15,332 (1981) (state office's denial of the protest). The appeal argued against the BLM's decision to list 1,899,055 acres as WSAs. See 72 I.B.L.A. 125 (1983). Conservation groups had previously appealed certain special inventories, which had suggested an additional 312,593 acres of WSAs. See 45 Fed. Reg. 75,602, 75,605 (1980).

46. See 72 I.B.L.A. at 126-27. See generally Wheeler, *supra* note 42. "[O]ne of the appeals] was 2000 pages long, containing 300 photographs and 120 affidavits. Covering 925,000 acres on 29 roadless areas, it was the largest appeal of its kind in the history of the IBLA." *Id.* at 39. The conservation groups would likely have appealed more area if they had been given longer than the 30 days in which to protest the agency's decision. See *id.* at 34 (recollection of Sierra Club activist that "[i]f we had more time, money, and people, we might have appealed up to 2.9 million acres in 122 inventory units").

47. See Utah Wilderness Ass'n, 86 I.B.L.A. 89, 89-90 (1985) (describing result on prior appeal); see also Utah Wilderness Ass'n, 72 I.B.L.A. 125, 192 (1983) (appendix listing decisions with respect to each unit appealed).

acres still had been improperly excluded.<sup>48</sup> The IBLA again reversed part of the BLM's decision, designating an additional 76,500 acres as WSAs.<sup>49</sup> By the conclusion of the appeals process, the BLM had identified eighty-two WSAs, which included 3,231,327 acres of land.<sup>50</sup> Conservation groups had given the BLM more than a 600,000 acre "boost."

Despite their successful appeals, conservationists continued to believe that the BLM had vastly underestimated potential wilderness areas. Determined to continue the fight, in February 1985 they formed the Utah Wilderness Coalition,<sup>51</sup> whose members were sent into the field to map their view of which BLM lands should be designated as WSAs.<sup>52</sup> This mapping process was given an additional spur in 1986 when the BLM, in its Draft Environmental Impact Statement ("EIS"), recommended that only 1,892,402 acres of the 3,231,327 acres identified as WSAs be denominated wilderness areas by Congress.<sup>53</sup> Based on its field work, the Coalition responded to the Draft EIS by proposing 5.1 million acres of wilderness.<sup>54</sup>

Even after submitting their proposal, Coalition members continued to perform field work, documenting and mapping boundaries of proposed areas.<sup>55</sup> In 1990, after thousands of hours of such work, the Coalition revised its proposal to a final figure of 5.7 million acres of wilderness.<sup>56</sup> Soon thereafter, in November

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48. See 86 I.B.L.A. at 90.

49. See *id.*

50. See 1 UTAH STATE OFFICE, U.S. BUREAU OF LAND MANAGEMENT, UTAH BLM STATEWIDE WILDERNESS DRAFT ENVIRONMENTAL IMPACT STATEMENT 35 (1986) [hereinafter UTAH WILDERNESS DRAFT EIS]; see also 51 Fed. Reg. 4241 (1986) (describing preparation of Draft EIS). An EIS is an analytical document that evaluates impacts to the environment of a proposed action and reasonable alternatives to the action. It is required by the National Environmental Policy Act of 1969. 42 U.S.C. § 4332 (1994). See *infra* note 98 (discussing NEPA). In the Final EIS, the BLM added one WSA and raised the acreage on a few other WSAs for a total of 3,235,834 acres. See 1 UTAH STATE OFFICE, U.S. BUREAU OF LAND MANAGEMENT, UTAH BLM STATEWIDE WILDERNESS FINAL ENVIRONMENTAL IMPACT STATEMENT 62-63 (1990) [hereinafter UTAH WILDERNESS FINAL EIS].

51. See Wheeler, *supra* note 42, at 39.

52. See *id.* at 40.

53. See 1 UTAH WILDERNESS DRAFT EIS, *supra* note 50, at 30; see also 51 Fed. Reg. 4241 (1986) (announcing issuance of Draft EIS).

54. See 7 UTAH WILDERNESS FINAL EIS, *supra* note 50, at 246 (August 15, 1986 Comments of the Utah Wilderness Coalition on the Utah BLM Statewide Wilderness Draft EIS).

55. See Wheeler, *supra* note 42, at 40.

56. See *id.* The Utah Wilderness Coalition increased its wilderness proposal to

1990, the BLM issued its Final EIS.<sup>57</sup> Coalition pressure had again increased the BLM's recommendation, albeit marginally. In its final statement of proposed action, the BLM recommended that 1,975,219 acres were suitable for inclusion in the National Wilderness Preservation System.<sup>58</sup>

Even before the Final EIS was issued, Utah wilderness bills were proposed in Congress. In 1989, Representative Jim Hansen of Utah introduced a bill to designate 1.4 million acres as wilderness.<sup>59</sup> In a competing bill, Representative Wayne Owens, also of Utah, relied upon the Coalition's work to propose 5.4 million acres of wilderness.<sup>60</sup> Essentially the same bills were reintroduced during the next two Congresses, although during the 103rd Congress, Representative Maurice Hinchey of New York took over sponsorship of the bill introduced by Representative Owens, who had given up his seat.<sup>61</sup> Hinchey's version of the bill added an additional 300,000 acres to the proposal, bringing the total to the approximately 5.7 million acres desired by the Utah Wilderness Coalition.<sup>62</sup> Neither side, however, was able to advance its wilderness proposal. The bills of Democrats Owens and Hinchey could not overcome opposition from the Republicans in Utah's congressional delegation; and the bills offered by Representative Hansen stood little chance in the Democrat-controlled House.<sup>63</sup>

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8.5 million acres in July 1998. See Brent Israelsen, *Wilderness Advocates Want 8.5 Million Acres*, SALT LAKE TRIB., July 9, 1998, at B1; Dustin Solberg, *Utah Finds 3 Million More Wild Acres*, HIGH COUNTRY NEWS, Aug. 3, 1998, at 3.

57. See UTAH WILDERNESS FINAL EIS, *supra* note 50.

58. See *id.* at 3, 7. The BLM's own work had also been extensive. Between 1978 and 1992, a total of \$10,052,733 was expended and approximately 2,777 work months were charged to the wilderness program in Utah. See H.R. REP. NO. 104-396, at 11 (1995).

59. See H.R. 1501, 101st Cong. (1989) (1,405,625 acres). The 1.4 million acre figure was based on the "Paramount Wilderness Quality Alternative" identified in the Draft EIS. See *id.* § 2(a)(1); see also 1 UTAH WILDERNESS DRAFT EIS, *supra* note 50, at 40. That alternative was designed to include "those areas having minimum conflicts with other resources, to the extent possible, but also key areas where wilderness values clearly exceed other resource values if unavoidable conflicts exist." *Id.* at 20.

60. See H.R. 1500, 101st Cong. (1989); see also H.R. REP. NO. 104-396, at 11 (describing prior legislation).

61. See H.R. REP. NO. 104-396, at 11.

62. See *id.*

63. See *id.*; see also Daniel Glick, *Utah: A Wilderness Shell Game*, WILDERNESS, Dec. 22, 1995, at 14 (discussing wilderness "stalemate" prior to 1994 elections). For an overview and debate on some of the issues involving wilderness designation on

With the advent of a Republican-controlled Congress in 1994, the predominantly Republican Utah delegation saw an opportunity finally to pass wilderness legislation for Utah. In January 1995, the delegation requested that county commissioners potentially affected by the wilderness legislation recommend appropriate wilderness designations.<sup>64</sup> At the end of a process that involved forty-five public meetings, the counties recommended one million acres of wilderness and strong language protecting existing uses and water rights.<sup>65</sup> The delegation took that recommendation, along with the BLM's approximately 1.9 million acre recommendation in its Final EIS and other input,<sup>66</sup> and proposed in House Resolution 1745 and Senate Bill 884 that 1.8 million acres be designated as wilderness.<sup>67</sup> In contest with those bills, Representative Hinchey again introduced his bill proposing 5.7 million acres of wilderness.<sup>68</sup>

Because the Republicans controlled Congress, House Resolution 1745 and Senate Bill 884 created substantial concern among conservation groups. As great as their concern was over the bills' limited acreage,<sup>69</sup> they were perhaps equally concerned that the bills developed a new approach to wilderness area management, allowing construction of items such as reservoirs, transmission lines, pipelines, and communication sites.<sup>70</sup> They also were adamantly opposed to the bills' "hard release" language, which required that all BLM lands in Utah not designated as wilderness be released from the non-impairment criteria of

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the Colorado Plateau, see Symposium, *Issues in Wilderness Designation on the Colorado Plateau*, 13 J. ENERGY NAT. RESOURCES & ENVTL. L. 393 (1993).

64. See H.R. REP. NO. 104-396, at 11 (1995).

65. See *id.*

66. See *id.* ("After all was done, testimony from over 600 individuals was heard by the Utah delegation and Governor, the delegation received petitions signed by over 16,700 people, and letters from over 2,300 people were considered.")

67. H.R. 1745, 104th Cong. (1995) (authored by Rep. Hansen); S. 884, 104th Cong. (1995) (authored by Sen. Hatch); see also H.R. REP. NO. 104-396, at 11. In December 1995, Representative Waldholtz of Utah proposed an amendment that would have increased the acreage to approximately 2.2 million acres. See 141 CONG. REC. H14315-16 (daily ed. Dec. 12, 1995). The amendment was never considered, however, because the bill was withdrawn from consideration. See Jim Woolf, *House Shelves Utah Wilds Bill*, SALT LAKE TRIB., Dec. 15, 1995, at A1.

68. See H.R. 1500, 104th Cong. (1995).

69. For an overview of conservationists' concerns with House Bill 1475, see H.R. REP. NO. 104-396, at 26-30 (1995) (dissenting views).

70. See H.R. 1745, 104th Cong. § 9 (1995); S. 884, 104th Cong. § 9 (1995).



FLPMA section 603(c) and managed for “non-wilderness multiple uses.”<sup>71</sup> Conservationists wanted the bills to include the type of “soft release” language that had been included in prior wilderness bills.<sup>72</sup> Under soft release language, lands not designated as wilderness are released from 603(c) management, but the BLM may continue to consider an area’s wilderness characteristics in its land use plans, just as it looks at other multiple use options.<sup>73</sup>

After a fierce battle and a filibuster by Democratic Senator Bill Bradley, the Utah delegation was unable to pass its wilderness bill.<sup>74</sup> The partisan divide was simply too large to bridge. With Senator Hatch vowing that “we will never quit,” the Utah delegation promised to persevere in its efforts to pass the wilderness bill.<sup>75</sup> But in the end, no wilderness bill made it out of the 104th Congress.

*C. The Clinton Administration Turns to the Antiquities Act and a Reinventory*

Although the Utah delegation’s wilderness bill was defeated, the fact that it came so close to passage was troubling to conservationists and the Clinton Administration (“the Administration”), both of which preferred the 5.7 million acre Hinchey bill. With the Republicans in control of Congress, and with the BLM having identified only 3.2 million acres of WSAs, the Administration’s chances of securing its own wilderness objectives seemed dim. A new direction was needed. Two flanking maneuvers presented themselves. First, the Administration began to ponder the use of the Antiquities Act to withdraw land and establish a national monument. Second, Interior Secretary Babbitt wanted to change the terms of the debate. Arguing that no agreement on wilderness was possible as long as the opposing sides were “so far apart on the threshold, fundamental issue of how much BLM land

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71. H.R. 1745, 104th Cong. § 10(b) (1995); S. 884, 104th Cong. § 10(b) (1995) (emphasis added).

72. See H.R. REP. NO. 104-396, at 26-30 (dissenting views). Rep. Hinchey’s competing bill had no release language at all. See H.R. 1500, 104th Cong. (1995).

73. See H.R. REP. NO. 104-396, at 26-30 (dissenting views).

74. For newspaper articles discussing the defeat of the delegation’s proposal, see, for example, Laurie Sullivan Maddox, *GOP Loses Round, but Fight Isn’t Over*, SALT LAKE TRIB., Mar. 31, 1996, at A1; Laurie Sullivan Maddox, *Hatch Vows to Revive Wilderness Bill*, SALT LAKE TRIB., Mar. 28, 1996, at A1; Mark Obmascik, *Utah Wilds Come out a Winner*, DENV. POST, Apr. 6, 1996, at B1.

75. See Maddox, *Hatch Vows to Revive Wilderness Bill*, *supra* note 74.

has wilderness characteristics," he initiated a reinventory of the 2.5 million acres within the Hinchey bill that had not been identified as WSAs by the BLM in its initial inventory.<sup>76</sup>

### 1. The Antiquities Act as a Withdrawal Tool

Historically, the President's authority to withdraw public lands was quite broad. Not only had Congress passed a variety of laws, the Antiquities Act among them, giving the President withdrawal authority,<sup>77</sup> the Supreme Court had also affirmed a variety of executive withdrawals on the premise that congressional acquiescence in the withdrawal constituted an implied delegation of authority to the President.<sup>78</sup> With the passage of

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76. See Jim Woolf, *Babbitt vs. Hansen: Wilderness Debate in Utah Goes Back to Drawing Board*, SALT LAKE TRIB., Aug. 1, 1996, at A1. Secretary Babbitt said that he had assembled "a small team of career professionals, who have substantial expertise in addressing wilderness issues in Utah and elsewhere, to take a careful look at the lands identified in the 5.7 million-acre bill that have not been identified by the BLM as wilderness-study areas, and report their findings." *Id.*

77. The Property Clause of the United States Constitution allocates primary control over the public lands to Congress, giving it the power to "dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." U.S. CONST. art. IV, § 3, cl. 2. In theory, therefore, it is Congress, and not the executive branch, that makes withdrawal decisions. Thus, Congress may exercise its constitutional power to make withdrawals by statute (for example, create a national park or a national forest), or Congress may pass legislation delegating that authority to the executive branch. See generally David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279 (1982) (exploring the executive's authority to withdraw public lands); Charles F. Wheatley, Jr., *Withdrawals Under the Federal Land Policy Management Act of 1976*, 21 ARIZ. L. REV. 311 (1979) (same); Richard M. Johannsen, Comment, *Public Land Withdrawal Policy and the Antiquities Act*, 56 WASH. L. REV. 439, 442-43 (1981) (same).

78. See *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915). Quite a bit has been written on the withdrawal authority of the executive branch. See, e.g., Getches, *supra* note 77; Wheatley, *supra* note 77; Johannsen, *supra* note 77. The most comprehensive review of executive withdrawal authority is the 1970 report of the Public Land Law Review Commission ("PLLRC"). See U.S. PUBLIC LAND LAW REV. COMM'N, ONE THIRD OF THE NATION'S LAND (1970). Congress created the PLLRC in 1964 and charged it with preparing a series of reports on the plethora of public land laws and to make recommendations for change. See *Withdrawal, Reservation, and Restriction of Public Lands: Hearings on H.R. 1785, H.R. 3342, H.R. 5252, H.R. 6377, H.R. 4060, and H.R. 8783 Before the Subcomm. on Public Lands of the House Comm. on Interior and Insular Affairs*, 87th Cong. (1961-62); see also John F. Shepherd, *Up the Grand Staircase: Executive Withdrawals and the Future of the Antiquities Act*, 43 ROCKY MTN. MIN. L. INST. 4-1, 4-27 to 4-29 (1996) (discussing establishment of PLLRC). The PLLRC recommended that large scale withdrawals "be accomplished only by act of Congress," U.S. PUBLIC LAND LAW REV. COMM'N, *supra*, at 54

FLPMA in 1976, Congress attempted to limit the executive branch's withdrawal authority by repealing numerous statutory provisions giving withdrawal power to the executive branch,<sup>79</sup> and by giving the Secretary of the Interior new withdrawal authority subject to congressional veto and a variety of pro-cedural safeguards.<sup>80</sup> FLPMA, however, did not repeal the Antiquities Act.<sup>81</sup>

Although the Antiquities Act often escapes notice in conversations about important environmental legislation, it has, in fact, been one of the most powerful conservation tools of this century. In keeping with its grant of independent presidential

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(Recommendation 8), in part because of its finding that "areas set aside by executive action . . . have not had adequate study and there has not been proper consultation with people affected or with the units of local government in the vicinity, particularly as to precise boundaries." *Id.* at 1. Much of this recommendation was enacted in FLPMA six years later, *see infra* notes 287-88 and accompanying text, although the Antiquities Act was not repealed. *See infra* note 81 (discussing FLPMA's failure to repeal the Antiquities Act). *See generally* Shepherd, *supra*, at 4-28 to 4-32 (discussing the relationship between the PLLRC report and FLPMA).

79. In FLPMA, Congress expressly repealed the implied delegation of authority under *Midwest Oil* and otherwise severely curtailed the number of instances of express congressional delegation, repealing twenty-nine statutory provisions granting withdrawal authority to the executive branch. *See* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 704(a), 90 Stat. 2743, 2792 (1976); *see also* Getches, *supra* note 77, at 315; Wheatley, *supra* note 77, at 311, 317-19.

80. Under FLPMA, withdrawals of less than 5000 acres may be made by the Secretary of the Interior: (1) without restriction when he "deems" the acreage "desirable for a resource use"; (2) for a period of 20 years for an administrative site or other federal facility; and (3) for not more than five years to preserve a tract then under consideration for withdrawal by Congress. *See* 43 U.S.C. § 1714(d) (1994). For withdrawals of more than 5000 acres, the Secretary may only make the withdrawal for a period "of not more than twenty years." 43 U.S.C. § 1714(c)(1) (1994). The Secretary also must notify Congress of the withdrawal and provide Congress a variety of information about the proposed withdrawal, including its proposed use, an inventory of the site's natural resource values, impacts on present users of the land to be withdrawn, an investigation of "suitable alternative sites," and a report on the existence of mineral deposits. *See* 43 U.S.C. § 1714(c)(2) (1994); *see also infra* note 288 (listing the elements of the Secretary's report). Congress then has 90 days to pass a joint resolution disapproving the monument. *See* 43 U.S.C. § 1714(c)(1) (1994). If it does so, the withdrawal "shall terminate," as long as such a congressional veto provision is constitutional. *See id.*; *see also* Getches, *supra* note 77, at 318 n.225 (exploring the issue). Finally, FLPMA allows the Secretary to make an emergency withdrawal of any amount of lands for a period not to exceed three years. *See* 43 U.S.C. § 1714(e) (1994). *See generally* Wheatley, *supra* note 77, at 320-26 (discussing FLPMA's withdrawal procedures).

81. The legislative history of FLPMA gives no indication of why the Antiquities Act was not repealed along with the other statutes delegating withdrawal authority to the executive. *See* Shepherd, *supra* note 78, at 4-31 to 4-32 (discussing this issue and speculating on possible reasons).

withdrawal authority, the Antiquities Act, as initially enacted, was intended to allow the President to make only small withdrawals of public lands in order to protect prehistoric ruins and Indian artifacts.<sup>82</sup> Yet, as soon as the Act was enacted, presidents began to rely on its language allowing withdrawal of "other objects of historic or scientific interest"<sup>83</sup> to accomplish much larger withdrawals.

Within two years of enactment, President Theodore Roosevelt proclaimed eleven national monuments, including 800,000 acres as the Grand Canyon National Monument, relying most often on the Act's "scientific interest" language to justify the withdrawals.<sup>84</sup> Since its enactment in 1906, presidents have used the Antiquities Act 102 times to withdraw lands from the public domain as national monuments.<sup>85</sup> Prior to designation of the Grand Staircase, the most recent use of the Act was by President Jimmy Carter in 1978, when he invoked it to place some fifty-six million acres of Alaska within seventeen different national monuments.<sup>86</sup>

This conservation track record of the Antiquities Act must also be viewed in light of the fact that there has never been a successful legal challenge to any presidential use of the Act. Five cases have addressed the propriety of a national monument designation, and all five upheld the designation. In *Cameron v. United States*,<sup>87</sup> the first case to address the Act, the Supreme

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82. For an examination of the legislative history of the Antiquities Act, see Getches, *supra* note 77, at 300-08; Shepherd, *supra* note 78, at 4-8 to 4-13; Johannsen, *supra* note 77, at 449-50; RONALD F. LEE, THE ANTIQUITIES ACT OF 1906 (1970).

83. 16 U.S.C. § 431(2) (1994) (setting forth statutory language).

84. See Shepherd, *supra* note 78, at 4-14 n.57 (listing monuments and key reserving language); see also Grand Canyon National Monument, Proclamation No. 794, 35 Stat. 2175 (1908).

85. See Bureau of Land Management, *Monuments Established by Presidential Proclamation* (visited June 11, 1998) <<http://www.blm.gov/nhp/news/alerts/monuments.html>> (describing each monument, the President who proclaimed it, the objects reserved, the acreage of the initial reservation, and the subsequent history and current status of the monument).

86. See generally Johannsen, *supra* note 77, at 453-56 (discussing the Alaska withdrawals and the history of Alaska public lands legislation); see also Getches, *supra* note 77, at 306, 322-24. President Carter's action was taken to preserve the status quo during negotiation of the Alaska National Interest Lands Conservation Act ("ANILCA"). Congress terminated the national monuments upon passage of ANILCA in 1980. See Shepherd, *supra* note 78, at 4-33; see also S. REP. NO. 96-413, at 133-34 (1979) (discussing President Carter's withdrawals and ANILCA).

87. 252 U.S. 450 (1920).

Court interpreted the Act's language broadly. Ignoring the legislative history suggesting the limited purpose of preserving antiquities and artifacts, the Court focused on the Act's plain language. It affirmed President Roosevelt's withdrawal of the Grand Canyon on the grounds that the entire canyon was "an object of unusual scientific interest" within the language of the Act.<sup>88</sup> This broad interpretation of the Act was taken a step further in *Wyoming v. Franke*,<sup>89</sup> which involved a challenge to President Franklin Roosevelt's designation of Jackson Hole National Monument.<sup>90</sup> There, the district court held that the President's use of the Antiquities Act would only be overturned if arbitrary and capricious.<sup>91</sup> The court also held that the same standard of review applied to the question of whether the size of the monument was, as required by the Act, the "smallest area compatible with the proper care and management of the objects to be protected."<sup>92</sup>

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88. *Id.* at 455-56. The *Cameron* Court did not offer any analysis of the history or purpose of the Antiquities Act. *See id.* Its sparse reasoning may have resulted in part from an antipathy to Cameron's position. Cameron had located a mining claim at the head of the famous Bright Angel trail leading down into the Grand Canyon from its south rim. *See id.* at 455. Despite the fact that the Secretary of the Interior had found that the claim was not valuable for mining purposes, Cameron had continued to occupy the land and charge access fees to tourists. *See id.* at 458. *See generally* JOHN D. LESHY, *THE MINING LAW: A STUDY IN PERPETUAL MOTION* 57-60 (1987) (discussing the *Cameron* litigation).

89. 58 F. Supp. 890 (D. Wyo. 1945).

90. The Jackson Hole National Monument was designated in 1943. *See* Proclamation No. 2578, 57 Stat. 731 (1943) (withdrawing 210,950 acres). It resulted in a firestorm of criticism from the Wyoming congressional delegation. *See* 89 CONG. REC. 2233-36 (1943). Although Congress passed a bill abolishing the monument, *see* H.R. 2241, 78th Cong. (1943); 90 CONG. REC. 9196 (1944), President Roosevelt pocket-vetoed the bill. *See* 90 CONG. REC. 9807 (1944). Congress remained defiant and, from 1943 until 1950, it attached a provision to the Interior Department appropriations bill prohibiting any funds from being used to manage the monument. *See* S. REP. NO. 81-1938, at 4 (1950). *See generally* Shepherd, *supra* note 78, at 4-15 to 4-18 (describing this dispute). Finally, in 1950, Congress negotiated a compromise with the Truman Administration under which the monument lands were added to the Grand Teton National Park, *see* Act of Sept. 14, 1950, Pub. L. No. 787, 64 Stat. 849, and the Antiquities Act was amended to prohibit the President from designating any additional national monuments in Wyoming. *See* 16 U.S.C. § 431a (1994).

91. *See* 58 F. Supp. at 895-96.

92. *Id.* at 896 ("What has been said with reference to the objects of historic and scientific interest applies equally to the discretion of the Executive in defining the area compatible with the proper care and management of the objects to be protected."); *see also supra* note 1 (quoting the Antiquities Act). The court also made clear that the motives of the President in making the designation were not relevant. *See* 58 F. Supp. at 896.

None of the three cases that followed departed from this basic interpretation of the Antiquities Act. In *Cappaert v. United States*,<sup>93</sup> the Supreme Court, citing *Cameron*, summarily rejected the argument that the Act applied only to archeological sites.<sup>94</sup> Likewise, in *Anaconda Copper Co. v. Andrus*,<sup>95</sup> a district court denied a challenge to President Carter's Alaska withdrawals based in large part on the controlling authority of *Cameron* and *Cappaert*.<sup>96</sup> Finally, in *Alaska v. Carter*,<sup>97</sup> a district court rejected another challenge to President Carter's Alaska withdrawals. In doing so, it added to the President's discretion under the Antiquities Act by holding that the National Environmental Policy Act ("NEPA")<sup>98</sup> does not apply to presidential use of the Antiquities Act, because the Act specifically gives the President "discretion,"<sup>99</sup> and because the President is not a federal

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93. 426 U.S. 128 (1976).

94. See *id.* at 141-42. Specifically, the Court rejected plaintiffs' argument that the Antiquities Act could not be used to set-aside Devil's Hole, a deep limestone cavern housing a pool and desert pupfish, which were remnants of the prehistoric Death Valley Lake System. See *id.* The pool and pupfish, said the Court, were objects of "historic or scientific interest." *Id.* at 142.

95. 14 Env't Rep. Cas. (BNA) 1853 (D. Alaska 1980) (denying plaintiff's motion for partial summary judgment). For a discussion of President Carter's Alaska monument designations, see *supra* note 86.

96. Although the court said that some limitation must exist on presidential exercise of the Antiquities Act, the court rejected plaintiff's partial summary judgment motion challenging the designation of the monuments "on the basis of the wording of the statute itself, its legislative history, its application by the Presidents from the very inception . . . and finally and importantly, for the controlling authorities [of] precedent established in *Cameron* and *Cappaert*." 14 Env't Rep. Cas. (BNA) at 1855. The court remarked that plaintiff's argument would have been "perhaps easier if we were at 1906." *Id.*; see also Shepherd, *supra* note 78, at 4-24 (discussing the case); Johannsen, *supra* note 77, at 457 & n.132 (same).

97. 462 F. Supp. 1155 (D. Alaska 1978).

98. NEPA establishes environmental planning and assessment requirements for all federal agencies. See 42 U.S.C. §§ 4321-4361 (1994). It does not mandate a particular environmental outcome. See *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) ("NEPA itself does not mandate particular results, but simply prescribes the necessary process. If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." (citations omitted)). Instead, NEPA requires federal agencies to consider the environmental impact of any proposed major federal action and possible alternatives. See 42 U.S.C. § 4332(C) (1994). It also mandates that the public have the opportunity to review the proposed action. See *id.* See generally COGGINS, *supra* note 18, at 332-36 (providing a brief overview of NEPA).

99. 16 U.S.C. § 431 (1994) ("The President of the United States is authorized, in his discretion, to declare by public proclamation . . .").

agency.<sup>100</sup> Alaska had argued that although the President himself was not an agency within the meaning of NEPA, he should have complied with NEPA because he relied on the recommendations of the Department of the Interior in making the designation.<sup>101</sup> The court rejected that argument and held that as long as the Interior Department made its recommendations at the request of the President, NEPA would not apply.<sup>102</sup>

For an administration seeking to circumvent Congress on the wilderness issue, the attractions of the Antiquities Act were, therefore, evident. Any legal challenge was unlikely to be successful. Moreover, using the Antiquities Act would avoid FLPMA's congressional veto and procedural safeguards, including its requirement of a report on the mineral potential of the mineral-rich Kaiparowits Plateau.<sup>103</sup> Use of the Antiquities Act also would avert NEPA, as long as the Interior Department had made its recommendations at the request of the President. It is thus unsurprising that members of the Clinton Administration discussed using the Antiquities Act to create a monument in Utah as early as August 1995,<sup>104</sup> soon after the Utah delegation's wilderness bill was introduced.<sup>105</sup> It was in March 1996, during the final congressional debates on the wilderness bill, however, that the consideration began in earnest.<sup>106</sup>

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100. See 462 F. Supp. at 1158-60.

101. See *id.*

102. See *id.* at 1160.

103. See *supra* note 80 (discussing FLPMA's congressional veto and procedural safeguards). Compare 43 U.S.C. § 1714(c) (1994) (FLPMA's procedural safeguards), with 16 U.S.C. § 431 (1994) (Antiquities Act). For an estimate of the mineral values in the Grand Staircase, see U.S. GEN. ACCOUNTING OFFICE, FEDERAL LAND MANAGEMENT: ESTIMATES OF MINERAL VALUES AND OF THE ECONOMIC EFFECTS OF DEVELOPING MINERALS IN THE GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT (GAO/RCED-97-117R, Apr. 17, 1997) [hereinafter GAO ESTIMATES].

104. See 143 CONG. REC. E2259, E2262 (daily ed. Nov. 9, 1997) (Legislative Study and Investigative Staff Report on Abuse of Discretion in the Creation of the Grand Staircase-Escalante National Monument under the Antiquities Act) [hereinafter Majority Report on GS-ENM Creation].

105. Representative Hansen of Utah introduced H.R. 1745 on June 6, 1995. See 141 CONG. REC. H5622 (daily ed. June 6, 1995).

106. See Majority Report on GS-ENM Creation, *supra* note 104, at E2264-67 (setting forth e-mail correspondence between and among the President's Council on Environmental Quality and the Department of Interior on consideration of the Monument as a response to the threat to Utah wilderness lands). In an effort to overcome a threatened veto and filibuster, H.R. 1745, the Utah wilderness bill, was ultimately combined with a number of other public lands bills and debate on the package began on Monday, March 25, 1996. See 142 CONG. REC. S2803 (daily ed. Mar. 25, 1996) (amending H.R. 1296 to include various bills); see also 142 CONG. REC.

The first concern of officials at the Council on Environmental Quality ("CEQ")<sup>107</sup> and the Interior Department was obtaining a letter from President Clinton to Interior Secretary Babbitt, requesting an investigation of and recommendation on which Utah lands were suitable for monument designation.<sup>108</sup> Such a letter, presumably, would fulfill the admonition of *Alaska v. Carter* that to avoid NEPA, the Interior Department's participation needed to result from a presidential request and not from the agency's own initiative.<sup>109</sup> As it turned out, the President's signature was delayed until much later in the summer,<sup>110</sup> creating an argument, albeit a weak one, for those who would later challenge the designation of the Monument that the investigation was initiated by the Interior Department and, therefore, that NEPA should apply.<sup>111</sup>

The President's signature may have been delayed in part because the CEQ and the Interior Department were still debating which Utah lands, if any, should be designated. In March, the

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S273 (daily ed. Mar. 25, 1996) (reflecting order on debate of bill).

107. The CEQ was established by NEPA. See 42 U.S.C. §§ 4341-4347 (1994). In addition to issuing regulations implementing NEPA, the CEQ is charged with a number of reporting and investigatory tasks relating to the quality of the environment. See *id.* § 4344 (setting forth duties and functions of the CEQ). See generally COGGINS & GLICKSMAN, *supra* note 19, at 10G.02[1] nn.3-4 (discussing role of the CEQ).

108. See Majority Report on GS-ENM Creation, *supra* note 104, at E2264-67 (e-mail correspondence).

109. See *supra* notes 97-102 and accompanying text (discussing *Alaska v. Carter*); see also Majority Report on GS-ENM Creation, *supra* note 104, at E2267 (April 25, 1996 e-mail from Sam Kalen to John Leshy, Dave Watts, and Robert Baum stating: "As I recall, the advice we have given over the last couple of decades is that, in order to minimize NEPA problems on Antiquities Act work, it is preferable to have a letter from the President to the Secretary asking him for his recommendations.").

110. The President finally executed the letter requesting the Interior Department's recommendation on August 7, 1996. See Majority Report on GS-ENM Creation, *supra* note 104, at E2261. But see *Utah Sch. & Institutional Trust Lands Admin. v. Clinton*, Civ. No. 97CV 492B at 40 (D. Utah filed June 25, 1997) (alleging that the President never signed the letter).

111. In fact, this is one of the claims raised in the lawsuits protesting the Monument's designation. See *infra* note 151 and accompanying text. It seems unlikely to be successful for at least two reasons. First, the letter finally signed by the President makes reference to a prior oral request to Interior Secretary Babbitt. See Jim Woolf, *First Option for Monument: Moab Monument Was Clinton Option*, SALT LAKE TRIB., Nov. 11, 1997, at B1 (quoting Kathleen McGinty of the CEQ that the process was "initiated verbally" by President Clinton over the July 4 weekend). Second, even if the Interior Department should have complied with NEPA, it seems likely that the later request of the President is sufficient to ratify what had already been accomplished.



focus was on non-protected lands adjacent to Arches and Canyonlands National Parks.<sup>112</sup> By July, however, the focus had shifted to the Kaiparowits Plateau, Escalante Canyons, and Grand Staircase regions, which were adjacent to Glen Canyon National Recreation Area, and which ultimately would be designated as part of the Grand Staircase-Escalante National Monument.<sup>113</sup> Unlike the lands adjacent to Arches and Canyonlands, which were not endangered,<sup>114</sup> in the case of the Kaiparowits, the Administration could point to a reason for the designation: Andalex, a Dutch-owned company, had federal coal leases on the plateau that it was proposing to develop.<sup>115</sup> Indeed, Andalex was well into the process of preparing its EIS.<sup>116</sup> As the Administration perceived it, the Monument could stop, or at the

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112. See Majority Report on GS-ENM Creation, *supra* note 104, at E2265.

113. See *id.* at E2259, E2265-68.

114. See, e.g., *id.* at E2265 (March 25, 1996 e-mail from Kathleen McGinty to J. Glauthier et. al. stating, "I'm increasingly of the view that we should just drop these Utah ideas. We do not really know how the enviros will react and I do think there is a danger of 'abuse' of the withdrawal/antiquities authorities especially because these lands are not really endangered.").

115. See *id.* at E2268 (July 25, 1996 memorandum from Kathleen A. McGinty to the President discussing the Andalex mine). The Administration's focus on stopping the Andalex coal mine was, in fact, one of the arguments made by the Utah School and Institutional Trust Lands Administration that the Administration's use of the Antiquities Act was illegitimate. They contended that the Administration's real purpose was to stop development on the Kaiparowits and not to protect any particular historic or scientific object. See *Utah Sch. & Institutional Trust Lands Admin. v. Clinton*, Civ. No. 97CV 492B (D. Utah filed June 25, 1997); see also *infra* Part II.A (discussing lawsuits against the Monument).

116. A copy of Andalex's 561 page Preliminary Draft Environmental Impact Statement is contained in STAFF OF HOUSE COMM. ON RESOURCES, 105TH CONG., 2D SESS., MONUMENTAL ABUSE: THE CLINTON ADMINISTRATION'S CAMPAIGN OF MISINFORMATION IN THE ESTABLISHMENT OF THE GRAND STAIRCASE ESCALANTE NATIONAL MONUMENT (Comm. Print 1998) [hereinafter SECOND HOUSE RESOURCE COMMITTEE REPORT ON GS-ENM CREATION].

very least, hinder Andalex's development of the mine,<sup>117</sup> thereby protecting the Kaiparowits.<sup>118</sup>

## 2. The Department of the Interior's Reinventory of Potential Utah Wilderness

During the same time that the Antiquities Act was being considered as a response to the Utah wilderness debate, the Department of the Interior came up with a second idea to thwart the Utah delegation's wilderness proposal: it would conduct a reinventory of potential wilderness in Utah.<sup>119</sup> The idea was to

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117. See Majority Report on GS-ENM Creation, *supra* note 104, at E2269 (August 14, 1996 memorandum from Kathleen A. McGinty to the President discussing the opportunity to thwart Andalex's coal development); see also *id.* at E2271 (August 23, 1996 memorandum from Kathleen A. McGinty to the President stating: "While a monument designation is not capable of stopping the mine (all existing property rights and uses would be held harmless), it would make it more difficult for the mining company to secure approval of their request for a 20 mile road that they would propose to run across federal land, again in the heart of this area."); Shepherd, *supra* note 78, at 4-33 to 4-36 (discussing the effect of monument designation on mineral development within a monument); *infra* Part II.B (discussing the designation's potential impact on valid existing rights within the Monument).

118. See Bureau of Land Management, *Remarks by the President in Making Environment Announcement* (visited on July 25, 1997) <<http://www.blm.gov/nhp/news/alerts/EscClint.html>> [hereinafter *President's Remarks*] ("I am concerned about a large coal mine proposed for the area. Mining jobs are good jobs, and mining is important to our national economy and to our national security. But we can't have mines everywhere, and we shouldn't have mines that threaten our national treasures."). The House Resource Committee has taken a different view than President Clinton on whether the Andalex mine would have endangered the Kaiparowits Plateau, noting that Andalex's Preliminary Draft Environmental Impact Statement ("PDEIS") did "not list a single major impact associated with development of the [Andalex mine] that would affect the list of 'environmental values' supposedly protected by the designation of the Utah Monument." SECOND HOUSE RESOURCE COMMITTEE REPORT ON GS-ENM CREATION, *supra* note 116, at 9 (comparing PDEIS's findings of impact with proclamation's list of environmental values protected by establishment of the Monument).

119. See Majority Report on GS-ENM Creation, *supra* note 104, at E2266 (March 29, 1996 e-mail from Linda Lance to T. Jensen et al. proposing a meeting at the Interior Department where "[w]e'll push them on new wilderness inventory and Kaiparowitz/Escalante [sic]"). In fact, soon after this meeting to discuss a re-inventory, Representative Hansen of Utah challenged Secretary Babbitt to perform a re-inventory, arguing that until he did so, he had no basis for challenging the Utah delegation's wilderness proposal. See *Interior Department Review and Budget: Oversight Hearing before the House Comm. on Resources*, 104th Cong. 27 (1996) (statement of Rep. Hansen).

All I am saying is to re-inventory it . . . I keep hearing these comments about all this additional acreage but I have yet to see the criteria; I have yet to see the first acre of ground, Mr. Secretary, that says here is where

reevaluate the 2.5 million acres of the 5.7 million acres of wilderness claimed by conservation advocates that had not been identified as WSAs by the BLM in its initial FLPMA section 603 inventory.<sup>120</sup> If those 2.5 million acres could be identified as possessing wilderness characteristics, the Utah delegation would no longer be able to use the BLM's 3.2 million acre figure as a ceiling in the negotiation of potentially designatable wilderness areas.

Unsurprisingly, the Republicans in the Utah delegation were strongly opposed to the reinventory, warning in a letter: "We prefer to work with you to resolve this issue. However, if we cannot work with you, then we will work against you at every turn."<sup>121</sup> As far as they were concerned, the "threshold, fundamental issue of how much BLM land has wilderness characteristics" had already been answered.<sup>122</sup> If that "threshold" inquiry still needed to occur, as suggested by the Interior Secretary, what, they asked, had been the purpose of the entire public inventory and appeal process conducted during the 1980s. Such was the state of affairs on the eve of the Monument's designation. The Utah delegation showed no signs of movement toward the 5.7 million acre wilderness proposal preferred by the Administration and was threatening to block any official effort to

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it is . . . [S]o rather than shouting at each other, why don't we just come up with some work and find out where it is?

*Id.* When Secretary Babbitt actually announced the re-inventory, Representative Hansen strongly objected, arguing that the re-inventory would be a waste of time and money. See Jim Woolf, *Did Bennett Seek to Kill Wilds Plan*, SALT LAKE TRIB., Sept. 7, 1996, at B1; see also *infra* notes 121-122 and accompanying text (discussing opposition to re-inventory).

120. See *supra* note 76 and accompanying text (discussing this issue).

121. Jim Woolf, *As Babbitt Backs up, Utahns Say Back off Wilderness*, SALT LAKE TRIB., Aug. 2, 1996, at A1. But see *supra* note 119 (indicating that Rep. Hansen had originally called for a reinventory).

122. Although Secretary Babbitt said that "no particular acreage target" had been established, Woolf, *supra* note 76, at A1, there was little question that the purpose of the re-inventory was to provide additional support for a larger wilderness proposal, particularly because Babbitt had earlier admitted that he supported about five million acres of wilderness. See *Interior Department Review and Budget: Oversight Hearing before the House Comm. on Resources*, 104th Cong. 26-27 (1996) ("I believe from my own experience, from my knowledge, from the work of the land specialists in this Department that there are in fact 5 million acres."); see also Jim Woolf, *BLM Experts Set to Reassess Wilderness*, SALT LAKE TRIB., Aug. 29, 1996, at B1 (reporting the same).

find out whether the disputed acreage even had wilderness characteristics.<sup>123</sup>

#### D. The "Utah Event"

By the end of July 1996, it was apparent to the CEQ and the Interior Department that their best opportunity for protecting Utah's public lands was the Antiquities Act. One question remained, and it was an important one given the election season: how would the Monument play politically?<sup>124</sup> The answer given to President Clinton by both his advisors and prominent Democrats in the West was positive.<sup>125</sup> As they saw it, the designation would "have particular appeal" in the urban areas of the West where President Clinton had the best opportunity for capturing votes, and would only hurt him in staunchly Republican Utah and with rural constituencies that were unlikely to vote for him in any event.<sup>126</sup> Stopping the Andalex mine in

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123. In any event, Utah supporters of the delegation's wilderness proposal were not going to wait to find out what the results of the re-inventory would be. On October 14, 1996, they sued Secretary Babbitt seeking an injunction against the re-inventory. See generally Mike Gorrell, *Lawmakers Have Tough Words for BLM*, SALT LAKE TRIB., Oct. 17, 1996, at A4. See also Jim Woolf, *Utah Tells Babbitt: See You in Court*, SALT LAKE TRIB., Oct. 15, 1996, at A1. The plaintiffs in the lawsuit were the State of Utah, the Office of State Institutional Trust Lands Administration, and the Utah Association of Counties. See *id.* On November 12, 1996, United States District Judge Dee Benson granted an injunction prohibiting Babbitt from continuing the wilderness re-inventory. See also Jennifer Toomer, *Injunction Issued on Land Inventory*, SALT LAKE TRIB., Nov. 13, 1996, at B1. See generally Jim Woolf, *Utah Prevails as Judge Halts Wilderness Study*, SALT LAKE TRIB., Nov. 16, 1996, at A1. The injunction was later overturned by the Tenth Circuit. See *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998).

124. See Majority Report on GS-ENM Creation, *supra* note 104, at E2268 (Aug. 5, 1996 e-mail from Kathleen McGinty to Marcia Hale suggesting that President Clinton contact several important western Democrat officials and noting that "[t]he reactions to these calls, and other factors, will help determine whether the proposed action occur").

125. See *id.* at E2268 (Aug. 5, 1996 e-mail from Kathleen McGinty to Marcia Hale suggesting that President Clinton contact Governors Roy Romer and Bob Miller, former governors Mike Sullivan and Ted Schwinden, Senators Harry Reid and Richard Bryan, and Representative Bill Richardson).

126. See *id.* at E2269 (Aug. 14, 1996 memorandum from Kathleen McGinty to the President). Ms. McGinty informed the President that establishment of the Monument

would help to overcome the negative views toward the Administration created by the timber rider . . . create a compelling reason for persons who are now disaffected to come around and enthusiastically support the Administration. . . . [and] be popular nationally in the same way and for the same reasons that other actions to protect parks and public lands are

particular "would represent an immense victory in the eyes of environmental groups."<sup>127</sup>

With political support lined up, the only thing left to do was to schedule an announcement of the designation, what staffers were now calling the "Utah Event,"<sup>128</sup> and to schedule it quickly lest Utah's delegation get wind of the plan. In light of the amount of staff work that had been done, and because of the President's queries of western Democrats, Administration members were acutely concerned someone might leak word of the designation.<sup>129</sup> Word finally did leak out on September 6, 1996, when the Administration learned that the *Washington Post* planned to run a story on the proposed designation.<sup>130</sup> Fearful that once the Utah delegation learned of the proposed monument it would take legislative action to block it,<sup>131</sup> the Administration took two actions. First, a firm date for the "Utah Event" was quickly

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popular. The nationwide editorial attacks on the Utah delegation's efforts to strip wilderness protection from these and other lands is a revealing recent test of public interest in Utah's wild lands. In addition, the new monument will have particular appeal in those areas that contribute most visitation to the parks and public lands of southern Utah, namely, coastal California, Oregon, and Washington, southern Nevada, the Front Range communities of Colorado, the Taos-Albuquerque corridor, and the Phoenix-Tucson area. This assessment squares with the positive reactions by Sen. Reid, Gov. Romer, and Rep. Richardson when asked their views on the proposal.

*Id.* In the actual event, the political advice was correct. Utah, a staunchly Republican state, gave Bob Dole his highest margin of victory, with President Clinton receiving only 33% of the votes compared to Dole's 54%. *See Presidential Vote: County by County*, USA TODAY, Nov. 8, 1996, at A6. Meanwhile, Arizona, New Mexico, Nevada, California, Oregon and Washington all went for Clinton. *See id.*

127. Majority Report on GS-ENM Creation, *supra* note 104, at E2269 (Aug. 14, 1996 memorandum from Kathleen McGinty to the President). *But see supra* note 118 (discussing conflicting views on actual environmental impact of Andalex's proposed mine).

128. Majority Report on GS-ENM Creation, *supra* note 104, at E2268-69 (e-mail correspondence between CEQ staffers).

129. *See id.* at E2268 (Aug. 5, 1996 memorandum from Kathleen McGinty to Marcia Hale stating that "any public release of the information would probably foreclose the President's option to proceed"); *id.* at E2271 (Aug. 23, 1996 e-mail from Kathleen McGinty stating that "we need to decide this soon, or I fear, press leaks will decide it for us").

130. *See id.* at E2271 (Sept. 6, 1996 memorandum from Kathleen McGinty to the President: "We learned late today that the Washington Post is going to run a story this weekend reporting that the Administration is considering a national monument designation.").

131. *See id.* at E2271 (Sept. 6, 1996 memorandum from Kathleen McGinty to the President: "This [the Washington Post story] could lead the Utah delegation to try efforts such as a rider on the Interior Appropriations bill next week to prevent you from taking any such action").

scheduled.<sup>132</sup> In the meantime, the Utah delegation was told that "no final decision on establishing a monument has been made."<sup>133</sup>

In the end, the "Utah Event" was scheduled for Arizona.<sup>134</sup> And, on September 18, 1996, the President stood before the Grand Canyon and designated the Monument.<sup>135</sup> Caught flat-footed, the Utah delegation could do little except complain.<sup>136</sup> The Administration had accomplished its objectives. It had produced a powerful and appealing campaign event with the West's most renowned natural landmark as a spectacular backdrop, and it had outflanked the Utah congressional delegation on the wilderness issue.

With respect to those lands within the new monument, the Utah delegation had proposed designating only 403,169 acres as wilderness and the Utah Wilderness Coalition had proposed 1,339,231 acres.<sup>137</sup> The Administration had gone even further, designating 1.7 million acres as the Monument. In fact, because almost 176,600 acres of Utah's school trust lands<sup>138</sup> were within

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132. Apparently, by September 11 the event had been scheduled for the South Rim of the Grand Canyon. See *id.* at E2259, E2271 (Sept. 11, 1996 e-mail of Tom Kenworthy, *Washington Post* reporter, stating: "[S]outh rim of the grand canyon, Sept. 18—be there or be square.").

133. See Majority Report on GS-ENM Creation, *supra* note 104, at E2272 (Sept. 13, 1996 letter from Interior Secretary Babbitt to Utah Senator Robert F. Bennett); see also *id.* at E2260 ("[T]he Utah Congressional delegation was being told by Ms. McGinty and top CEQ staff on September 9 that no decision had been made and the delegation would be consulted prior to any announcement."); *id.* (describing notes of Sept. 16 meeting with Sen. Hatch of Utah).

134. The event was finally scheduled for Arizona apparently for a couple of reasons. The President was campaigning there; logistically it presented fewer difficulties than actually coming to Utah; and Secretary Babbitt had earlier advised that making the announcement in Utah would "have the most confrontational of [sic] 'in-your-face' character." *Id.* at E2270 (Aug. 14, 1996 memorandum from Kathleen A. McGinty to the President); see also *supra* notes 3, 126 (discussing political advantages of making announcement in Arizona).

135. See *supra* notes 1-3 and accompanying text.

136. See *supra* notes 5-6 and accompanying text.

137. See State of Utah, School and Institutional Trust Lands Administration, Map, *Grand Staircase Escalante National Monument Trust Surface Ownership* (1997) (indicating the location and acreage within the Monument of the wilderness proposals of the Utah delegation and the Utah Wilderness Coalition) (on file with the author).

138. When Utah entered the Union in 1896, the federal government granted the state four 640-acre sections out of each 36-square-mile "township" for use in funding its schools. See Utah Enabling Act of July 16, 1894, ch. 138, § 6, 28 Stat. 109; *Utah v. Andrus*, 486 F. Supp. 995, 999-1000 (D. Utah 1979) (discussing Utah's school trust lands).

the Monument's boundaries, the area protected was actually closer to 1.87 million acres.<sup>139</sup>

Designating a national monument does not, of course, insure the same level of protection as wilderness designation. The permissible uses of a monument are within the discretion of the designating President, although the President presumably would abuse his discretion if he allowed uses of a monument incompatible with "the proper care and management" of the objects of "historic or scientific interest" that were to be protected by the designation.<sup>140</sup>

With respect to the Grand Staircase, President Clinton made the typical presidential withdrawal of all federal land within the Monument's boundaries from "entry, location, selection, sale, leasing or other disposition under the public land laws," subject to valid existing rights.<sup>141</sup> As a result of last-minute complaints by Utah Governor Michael Leavitt and Utah's congressional delegation, however, the President also made several "concessions" relating to management and use of the Monument.<sup>142</sup> He agreed that Utah would continue to manage the fish and wildlife within the Monument; that existing permits for and levels of grazing would not be affected by the designation; and that the designation would not create any federal reserved

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139. Utah owned approximately 176,600 acres of land, as well as 24,165 acres of mineral interests, within the exterior boundaries of the Monument. See H.R. 3830, 105th Cong. (1998). Because the school trust lands were interspersed with federal lands, the pattern of property ownership within the Monument represented a checkerboard. See State of Utah, School and Institutional Trust Lands Administration, Map, *Grand Staircase Escalante National Monument Trust Surface Ownership* (1997) (indicating the location of Utah's school trust lands within the Monument) (on file with the author).

140. See 16 U.S.C. § 431 (1994).

141. Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (1996).

142. The value of these "concessions" had been foreseen by Interior Secretary Babbitt whose advice had been passed along to the President by Kathleen McGinty. She proposed to the President:

[I]n establishing the monument, you take several steps to reduce short- and long-term opposition from Utah's pro-development interests and rural residents. First, he proposes that the BLM, rather than the National Park Service, manage the monument. Second, he proposes that you expressly disclaim any reservation of federal water rights for the monument. Third, the Secretary has proposed monument boundaries that exclude all developed areas and state park lands. Fourth, the Secretary has proposed that the new management regime for the monument area be defined through a multi-year public hearing and involvement process.

Majority Report on GS-ENM Creation, *supra* note 104, at E2272 (Sept. 16, 1996 memorandum from Kathleen A. McGinty to the President).

water rights.<sup>143</sup> Perhaps most interestingly, President Clinton decided that the Grand Staircase would be the first national monument managed by the BLM, an agency traditionally more favorable to resource users and extraction interests.<sup>144</sup>

The impact of these various concessions will take time to play out and will become more evident once the Secretary of the Interior completes a management plan for the Monument, due by September 18, 1999.<sup>145</sup> But whatever the concessions' impact, the designation was a clear victory for preservationists. Some 1.7 million acres were protected from further entry and are still

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143. See Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996). These last two concessions were not particularly remarkable. Any federal reserved rights would have been subsequent in priority to existing water uses. See *Cappaert v. United States*, 426 U.S. 128 (1976) (reserved rights subject to prior appropriations). And allowing grazing to continue as "governed by applicable law and regulations" simply postpones the grazing issue to another day. Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996). Grazing interests are not constitutionally protected property interests and thus the "applicable law and regulations" allow grazing permits to be limited or terminated by the BLM in the future. *Id.*; see *infra* note 166 (discussing the BLM's regulation of grazing); see also Robert B. Keiter, *Defining a Legal Framework for BLM Management*, in *VISIONS OF THE GRAND STAIRCASE*, *supra* note 2, at 95-96 (discussing potential limits on grazing within the Monument). In his speech at the South Rim of the Grand Canyon, President Clinton seemed to use broader language than in the proclamation in describing what uses could continue, promising that the Monument would "remain open for multiple uses including hunting, fishing, hiking, camping and grazing." *President's Remarks*, *supra* note 118 (emphasis added); see *infra* notes 219-25 and accompanying text (discussing the implications of this language). He also promised that the creation of the Monument would "not come at the expense of Utah's children." *President's Remarks*, *supra* note 118. With respect to the 176,000 acres of state-owned school trust lands within the Monument, he stated: "I have directed Secretary Babbitt to consult with Governor Leavitt, Congressman Orton, Senators Bennett and Hatch to form an exchange working group to respond promptly to all exchange requests and other issues submitted by the state and to resolve reasonable differences in valuation in favor of the school trust." *Id.* (emphasis added).

144. See generally George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 61-100 (1982) (discussing the history of rangeland management); George Cameron Coggins & Doris K. Nagel, "Nothing Beside Remains": *The Legacy of James G. Watt's Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 B.C. ENVTL. AFF. L. REV. 473, 483 (1990) (The BLM's "main historical functions are indicated by its derisory nickname, the 'Bureau of Livestock and Mining' and by observing that "[t]he agency has long been considered a model of the 'capture' phenomenon because some of its operations essentially have been controlled by the entities that the agency is supposed to regulate").

145. See Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (1996). The BLM recently published its Draft Management Plan. See BUREAU OF LAND MANAGEMENT, GRAND STAIRCASE-ESCALANTE NATIONAL MONUMENT DRAFT ENVIRONMENTAL IMPACT STATEMENT (1998).



available for wilderness designation if they meet the necessary criteria.<sup>146</sup>

## II. THE LEGAL FALLOUT FROM THE GRAND STAIRCASE DESIGNATION

Given the rancor with which the Grand Staircase-Escalante National Monument was greeted, the unsurprising result of the designation has been a number of legal disputes. This legal fallout has manifested itself in four primary areas: first, in direct challenges to the President's use of the Antiquities Act; second, in disputes about the extent and use of valid existing rights within the Monument; third, in debate about the school trust lands within the Monument and ultimately in their exchange for federal lands; and fourth, in proposed legislation amending or repealing the Antiquities Act. Although a thorough exploration of each of these areas is beyond the scope of this article, a brief overview is necessary to give context to the article's discussion of the pitfalls of the withdrawal process employed in the case of the Grand Staircase.

### A. *Challenges to the Withdrawal*

In the two years since the creation of the Grand Staircase-Escalante National Monument, three lawsuits have been filed alleging that President Clinton acted illegally in creating the Monument.<sup>147</sup> Although resolution of the cases will likely turn on whether the withdrawal of the Grand Staircase was an appropriate exercise of the Antiquities Act, each complaint states a variety of causes of action.<sup>148</sup> They include unlikely claims

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146. See 16 U.S.C. § 1133(a)(3) (1994) (noting that designation of wilderness area within a national monument "shall in no manner lower the standards evolved for the use and preservation of such . . . monument").

147. See *infra* note 148 (listing the lawsuits).

148. For example, in its complaint, the Mountain States Legal Foundation urges the court to declare that the actions of President Clinton, Secretary Babbitt and the United States:

(1) violate the Antiquities Act because the President failed to "confine the area to the smallest area compatible with the area to be protected"; (2) violate the Antiquities Act because the President did not confine his proclamation to "objects" of "historic" or "scientific" interest but included general scenery and living organisms; (3) violate the Antiquities Act because the President's designation was arbitrary and capricious; (4) violate the U.S. Constitution, Article IV, Section 3, Clause 2, because the

under the Constitution,<sup>149</sup> FLPMA,<sup>150</sup> and NEPA.<sup>151</sup> The

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powers exercised by Defendants exceeded the congressional grant of presidential authority over federal lands; (5) violate the U.S. Constitution, Article IV, Section 3, Clause 2, because only Congress, through the Property Clause, has authority to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States"; (6) violate [FLPMA] because Congress limited and circumscribed the executive branch's withdrawal authority and that limited power was exceeded; (7) violate FLPMA because Congress expressly reserved all Wilderness Act decisions for itself and the President's Monument designation includes Wilderness Study Areas being considered by Congress and the President's Monument designation constitutes "de facto" wilderness designation; (8) violate the Federal Advisory Committee Act (FACA) because Defendants failed to follow FACA requirements in establishing and chartering a federal advisory committee and failed to provide notice and reasonable opportunity for public participation; (9) violate the U.S. Constitution, Article I, Section 9, Clause 7, because only Congress has the constitutional authority under the Spending Power to obligate that money will be drawn from the Treasury; and (10) violate the Anti-Deficiency Act because Defendant Clinton's designation effectively reappropriated and diverted unexpended appropriation balances for other than their original activities, which are construed and accounted as new appropriations that increase the public debt and violate the Anti-Deficiency Act.

Mountain States Legal Found. v. Clinton, No. 97CV 0836G (D. Utah filed Nov. 5, 1997) at 3-4 (citation omitted); *see also* Utah School & Institutional Trust Lands Admin. v. Clinton, Civ. No. 97CV 492B (D. Utah filed June 25, 1997) (making many of the same claims and adding a claim under Utah's Enabling Act and the "equal footing" doctrine); Utah Assoc. of Counties v. Clinton, Civ. No. 97CV 0479B (D. Utah filed June 23, 1997) (stating causes of action under the Constitution, FLPMA, NEPA, and the Antiquities Act).

149. The constitutional claims under the Property Clause are essentially arguments that Congress improperly delegated its authority to the President in the Antiquities Act. *See supra* note 148 (setting forth plaintiffs' claims). The nondelegation doctrine, however, is essentially a constitutional dead letter. *See* COGGINS & GLICKSMAN, *supra* note 19, § 4.07 (reviewing nondelegation doctrine and noting that "[t]he nondelegation doctrine fell into desuetude after the New Deal when courts upheld even the broadest and vaguest of statutory delegations"). For a court to hold that the Antiquities Act was an unlawful delegation would also put in question FLPMA's delegation of authority to the Interior Secretary. *See supra* note 80 and accompanying text (outlining FLPMA's withdrawal procedure).

150. The claims that the Grand Staircase designation violated FLPMA are also a significant stretch. It is true that using the Antiquities Act to withdraw areas like the Grand Staircase essentially swallows the withdrawal procedure of FLPMA. If the President can use the Antiquities Act to withdraw as large an area as the Grand Staircase primarily for scenic purposes, why would the President ever feel the need to use FLPMA? But FLPMA expressly repealed 29 grants of executive withdrawal authority, *see* Pub. L. No. 94-579, § 704(a), 90 Stat. 2744, 2792 (1976), without mentioning the Antiquities Act, despite the fact that the Act had been used to make withdrawals similar to the Grand Staircase. *See supra* note 79. Under the basic rule of statutory construction of *expressio unius est exclusio alterius* (the express inclusion of one is an exclusion of another), it is simply difficult to read FLPMA as having silently repealed the Antiquities Act. In fact, some might view this failure to repeal the Antiquities Act as congressional acquiescence to prior interpretations of the Act. *See* United States v. Midwest Oil Co., 236 U.S. 459 (1915) (finding congressional

Antiquities Act arguments have two prongs, both of which have appeared in prior challenges to uses of the Act.

First, the plaintiffs argue that the President did not confine his proclamation to objects of "historic" or "scientific" interest, but instead included general scenery and living organisms.<sup>152</sup> This contention is unlikely to succeed. It is essentially the same argument rejected by the Supreme Court in *Cameron* and *Cappaert*, where the Court decided that the Act would be given a broad reading.<sup>153</sup> If the Grand Canyon was deemed an "object" of scientific interest in *Cameron*, it is hard to see how the Escalante Canyons, Kaiparowits Plateau, and Grand Staircase formation would not be afforded the same status.<sup>154</sup> The arg-

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acquiescence to executive withdrawals). *But see infra* note 311 and accompanying text (questioning this assumption).

151. The NEPA claim also seems unlikely to succeed. Although the evidence indicates that the Grand Staircase proposal was initiated by the Interior Department and the CEQ rather than the President, *see supra* notes 104-18 and accompanying text, the President's later involvement almost surely avoids the need for NEPA compliance. He is not a federal agency; the Antiquities Act expressly commits the withdrawal decision to his "discretion"; and nothing prevents him from picking up an idea advanced by the Interior Department and running with it. Although the Interior Department and the CEQ may have violated NEPA, *see supra* notes 97-102 and accompanying text (discussing *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978)), striking a legal presidential designation seems an unlikely remedy.

152. More specifically, the plaintiffs allege that the Interior Department predetermined the area they wished to see put off limits to development and then "undertook searches of literature and information provided by environmental groups to attempt to locate objects that could serve as a pretext for monument designation." *See Utah Sch. & Institutional Trust Lands Admin. v. Clinton*, Civ. No. 97CV 492B at 11-12 (D. Utah filed June 25, 1997); *see also id.* at 22-23 (describing the CEQ "Project Liberty Checklist," which proposes development of a record to justify the boundaries and lists "[p]ossibilities" for historic and scientific values to be protected).

153. *See supra* notes 87-88, 93-94 and accompanying text (discussing the Court's decisions in *Cameron* and *Cappaert*). Although the identification of objects likely followed the identification of the land as plaintiffs suggest, *see supra* note 152, it seems unlikely that sequence will be dispositive of the propriety of using the Antiquities Act. As long as objects are eventually identified, and surely they were, *see infra* note 156 and accompanying text, the protective designation is likely to be upheld.

154. Some would surely disagree with this assertion. Many of the local residents have argued, for example, that the Kaiparowits Plateau on which the proposed Andalex mine site is located, "is the ugliest place in the whole monument." Paul Larmer, *Beauty and the Beast*, HIGH COUNTRY NEWS, Apr. 14, 1997, at 9 (quoting Garfield County Commissioner Louise Liston); *see id.* at 10 (quoting Kanab town councilman that "I've been out to the (Andalex) mine site regularly since 1988, and I've never seen a backpacker on the Kaiparowits"); Brooke Adams, *Most Utahns Opposed to Designation*, DESERET NEWS, Sept. 19, 1996, at A1 (arguing that President Clinton did not "come to Utah where the monument is because the nation would have laughed him out of office . . . . It's nothing but cow trails"); *see also* Mike

ument is also unlikely to prevail because the proclamation withdrawing the Monument was drafted by one of the country's preeminent public lands scholars.<sup>155</sup> It carefully covers each potential ground for Antiquities Act withdrawal authority,<sup>156</sup> making it difficult to show that the President's actions were arbitrary and capricious.<sup>157</sup>

The second argument that President Clinton's designation violated the Antiquities Act is that 1.7 million acres was not "the smallest area compatible with the proper care and management of the objects to be protected."<sup>158</sup> The plaintiffs contend that the President's use of BLM jurisdictional boundaries makes clear that his purpose was to protect land, not objects.<sup>159</sup> The difficulty with this argument is again the standard of review. Even if plaintiffs can put forward a strong case that the Monument is larger than

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Gorrell, *Coal v. Cool! Does Beauty Outweigh Economic Value?; Escalante Area Is Largely Untouched*, SALT LAKE TRIB., Sept. 18, 1996, at A1 (noting that the Kaiparowits is often described as "sterile" and "sparse"). Of course, the very sterility and sparseness of the Kaiparowits is what wilderness advocates praise as an opportunity for solitude and primitive recreation within the meaning of the Wilderness Act. See Wilderness Act of 1964, 16 U.S.C. § 1131(c) (1994); *supra* note 35 (discussing the Wilderness Act).

155. The proclamation was drafted by Charles Wilkinson, a law professor at the University of Colorado School of Law, at the request of Interior Solicitor John Leshy, himself a public lands scholar from Arizona State University College of Law. See Majority Report on GS-ENM Creation, *supra* note 104, at E2263.

156. See Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996) (noting that the monument "is a geologic treasure . . . includes world class paleontological sites," exhibits "extensive use . . . by ancient Native America cultures . . . is rich in human history [and] is an outstanding biological resource," and expanding on each issue in a separate paragraph). The description of "objects" within the Grand Staircase is actually quite a bit more detailed than that of most other Antiquities Act proclamations. See Proclamation No. 3887, 83 Stat. 920 (1969) (Arches National Monument); Proclamation No. 3888, 83 Stat. 922 (1969) (Capitol Reef National Monument).

157. See *Wyoming v. Franke*, 58 F. Supp. 890, 894-96 (D. Wyo. 1945) (finding that the President's designation of national monument will only be overturned if arbitrary and capricious).

158. Antiquities Act, 16 U.S.C. § 431 (1994).

159. One of the complaints pointed out:

The Monument's boundaries conform to the boundaries of the public land managed by the BLM and previously studied for wilderness. The Monument excludes all units of the National Forest System and the National Park System, and stops at the Utah-Arizona border, even though several of the so-called 'objects' to be protected—including the Grand Staircase for which the Monument is named—are primarily located in Arizona.

Utah Sch. & Institutional Trust Lands Admin. v. Clinton, Civ. No. 97CV 492B at 22 (D. Utah filed June 25, 1997).

necessary, they likely will be unable to show that the President's decision on Monument boundaries was arbitrary and capricious.<sup>160</sup> In the end, there is little reason to think that the history of judicial deference to presidential use of the Antiquities Act will not repeat itself. The Monument should survive these legal challenges.

### *B. Valid Existing Rights Within the Monument*

In designating the Grand Staircase-Escalante National Monument, the President, of course, withdrew only federal lands from further entry. State school trust lands and private lands remained interspersed throughout the Monument. Moreover, those federal lands that were withdrawn were "subject to valid existing rights."<sup>161</sup> Thus, to the extent the Monument designation is upheld, the primary legal controversies will involve disputes over the extent of these "valid existing rights" in federal lands, and battles over access to state school trust lands and private lands.

Making the withdrawal of federal land "subject to valid existing rights" offers less protection to the holder of a right in federal land than might initially appear. The reason is that the existing rights are not absolute but subject to a variety of restrictions. The right to operate a mine on federal land is not, for example, unlimited. Prior to designation of the Monument, the Secretary of the Interior was empowered to regulate mining claims "to prevent unnecessary or undue degradation."<sup>162</sup> And, in determining what constitutes unnecessary or undue degradation, the Secretary was required to consider the character of the surrounding area.<sup>163</sup> Moreover, for mining claims in wilderness

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160. See *Franke*, 58 F. Supp. at 894-96 (setting forth arbitrary and capricious standard of review); see also *supra* notes 89-92 and accompanying text.

161. Proclamation No. 6920, 61 Fed. Reg. 50,223 (Sept. 24, 1996).

162. FLPMA, 43 U.S.C. § 1732(b) (1994). Any mine that will disturb more than five acres must also submit a plan of operations to the BLM for approval, see 43 C.F.R. § 3809.1-4 (1998), and the plan will be approved only if it prevents unnecessary or undue degradation and provides for reasonable reclamation. See *id.* § 3809.1-6.

163. See 43 C.F.R. § 3809.0-5 (1997) (suggesting that the Secretary should consider "the effects of operations on . . . resources and uses outside the area of operations" and that "[w]here specific statutory authority requires the attainment of a stated level of protection or reclamation . . . that level of protection shall be met"); see also *Clouser v. Espy*, 42 F.3d 1522 (9th Cir. 1994) (affirming Forest

study areas, the claimants were generally prohibited from any development that would impair the area's suitability for designation as wilderness.<sup>164</sup> Federal mineral leases, grazing permits, and other existing rights<sup>165</sup> were likewise subject to a variety of statutory and regulatory restrictions on use and access.<sup>166</sup> Finally, all existing rights were subject to additional restrictions duly adopted in the future.

The Secretary of the Interior and the courts have thus interpreted the same "valid existing rights" language in FLPMA<sup>167</sup> to mean that the exercise of a valid existing right may

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Service's decision not to allow motorized access to a mining claim in a wilderness area), *cert. denied*, 515 U.S. 1141 (1995).

164. See 43 U.S.C. § 1782(c) (1994) (FLPMA section 603(c)). There are two exceptions to this nonimpairment standard. First, FLPMA provides that "mining and grazing uses and mineral leasing" may continue "in the manner and degree in which the same was being conducted on October 21, 1976." *Id.* These grandfathered activities are not subject to the nonimpairment standard, although they are still subject to regulation "to prevent unnecessary or undue degradation." *Id.*; see also *Rocky Mtn. Oil & Gas Ass'n v. Watt*, 696 F.2d 734, 748-49 (10th Cir. 1982) (interpreting section 603(c)); James N. Barkeley & Lawrence V. Albert, *A Survey of Case Law Interpreting "Valid Existing Rights"—Implications for Unpatented Mining Claims*, 34 ROCKY MTN. MIN. L. INST. 9-1, 9-36 (1988) (discussing section 603(c)). The second exception enunciated in FLPMA was for valid existing rights. See 43 U.S.C. § 1701(h) (1994) (protecting valid existing rights). Thus, those valid existing rights not covered in the grandfather provision of section 603(c), for example R.S. 2477 rights-of-way, are not subject to the non-impairment standard. See *Sierra Club v. Hodel*, 848 F.2d 1068, 1086-87 (10th Cir. 1988), *overruled on other grounds*, *Village of Los Ranchos De Albuquerque v. Marsh*, 956 F.2d 970, 972 (10th Cir. 1992).

165. A valid existing right is a property interest in federal land that can take a number of forms, including:

- (1) public land entries leading to acquisition of title, such as mining claims, homesteads, and trade and manufacturing sites;
- (2) leases and licenses that do not lead to acquisition of title, including mineral leases;
- (3) rights-of-way, easements and other forms of servitudes against the United States;
- (4) public land grants to the states; and
- (5) severed estates from federal ownership, such as severed mineral estates.

Barkeley & Albert, *supra* note 164, at 9-7 (footnotes omitted).

166. See, e.g., 43 U.S.C. § 1752(e) (1994) (allowing adjustments to grazing use); 43 C.F.R. § 4110.3-3(b) (1998) (same); 43 U.S.C. § 1752(g) (1994) (noting conditions for terminating a grazing lease); Mineral Leasing Act, 30 U.S.C. § 185(h) (1994) (requiring a plan for rights of way that controls or prevents "damage to the environment (including damage to fish and wildlife habitat)"); 30 U.S.C. § 207(c) (1994) (requiring an operation and reclamation plan for any coal lease that "might cause a significant disturbance of the environment"). See generally COGGINS & GLICKSMAN, *supra* note 19 (overview of various regimes governing resources on federal land).

167. See 43 U.S.C. § 1701(h) (1994) ("All actions by the Secretary concerned under this Act shall be subject to valid existing rights."). The same protection of valid existing rights appears in the Wilderness Act. See 16 U.S.C. §§ 1133(c), 1133(d)(3) (1994). In fact, over 100 statutes in the United States Code employ the

be restricted by applicable statutes and regulations, as long as the restriction does not "make economic development completely unprofitable":<sup>168</sup> essentially, as long as it does not constitute a Fifth Amendment taking.<sup>169</sup> And as arduous as it is to succeed on a regulatory takings claim for private land,<sup>170</sup> it is even more difficult where the federal government owns the underlying fee title.<sup>171</sup> In the end, therefore, the "valid existing rights" language

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term "valid existing rights." See Barkeley & Albert, *supra* note 164, at 9-6 n.7.

168. *Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979).

169. See *id.* at 1011 ("[S]uch regulation cannot be so restrictive as to constitute a taking."). There is some tension in the law with respect to just how far the Department of Interior may go in regulating a valid existing right. Solicitor Krulitz's initial opinion on this issue emphasized that regulation of valid existing rights was bounded only by the requirement that they not be condemned or taken. 86 Interior Dec. 89, 116 (1979). This opinion was later modified by the opinion of Solicitor Coldiron who emphasized that restrictions on a valid existing right "may not be so onerous that they unreasonably interfere with enjoyment of the benefit of the right." 88 Interior Dec. 909, 913 (1981). Depending on the gloss given to the term "unreasonably," this standard could prohibit some forms of regulation that would not constitute a taking, namely a regulation that interfered with enjoyment of the right but did not go so far as to "make economic development competitively unprofitable," *Andrus*, 486 F. Supp. at 1011, as is typically required for a taking. See *infra* note 170 (discussing how regulation will typically not constitute a taking unless it works a complete diminution in the economic value of the property). But see *Stupak-Thrall v. United States*, 89 F.3d 1269, 1270 (6th Cir. 1996) (en banc) (Moore, J., concurring) ("All authorities are in agreement that the 'subject to valid existing rights' language was essentially designed to restrain agencies from effecting a taking."), *cert. denied*, 117 S. Ct. 764 (1997).

170. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922) (Holmes, J.) ("[I]f regulation goes too far it will be recognized as a taking."). Unfortunately, the task of determining when a regulation goes too far is difficult to pin down. Although it is impossible in a footnote to capture the nuances and exceptions that are pervasive in takings law, it is generally accurate to say that if a regulation results in a physical invasion of property, it is almost surely a taking. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). On the other hand, where there is no physical invasion, a regulation will not result in a taking if it "substantially advance[s] legitimate state interests," that is, if the regulatory means are sufficiently related to the regulatory ends, and if it does not "den[y] an owner economically viable use of his land." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); see also *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 841 (1987). Even if the property owner can show that a particular regulation works a complete diminution in the economic value of his property, the regulation will not be a taking if it is consonant with "background principles" of state nuisance and property law. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992). See generally Richard J. Lazarus, *Putting the Correct Spin on Lucas*, 45 STAN. L. REV. 1411 (1993) (exploring implications of *Lucas* decision and this so-called "nuisance exception").

171. The Supreme Court has emphasized that property rights on public land are more susceptible to qualification because the United States maintains "broad powers over the terms and conditions upon which the public lands can be used,

probably does more to protect the federal treasury than rights holders. The language ensures that the withdrawal itself will not be construed as a taking, but allows a variety of restrictions to avoid degradation or impairment of the lands within the Monument.<sup>172</sup>

School trust and private lands within the Monument also are potentially subject to important restrictions because the development of such lands often requires access across federal land. The federal government is likely obligated to provide access to school trust lands.<sup>173</sup> The access, however, may be regulated to protect federal interests as long as the restrictions are not so "prohibitively restrictive as to render the land incapable of full economic development."<sup>174</sup> Access to private inholdings is more

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leased, and acquired." *United States v. Locke*, 471 U.S. 84, 104-05 (1985). Indeed, because the background principles of federal law include such "broad powers" over federal land, *see id.*, the so-called nuisance exception of *Lucas*, 505 U.S. at 1029, is more likely to apply, making a takings claim even more difficult. *See supra* note 170 (discussing *Lucas*). For an overview of takings law in the public lands context, *see* COGGINS & GLICKSMAN, *supra* note 19, §§ 4.03-.05. *See also id.* § 4.03 (noting that "a compensable taking of private property rights in a public natural resource has been and most likely will continue to be exceedingly rare").

172. Understood in this light, the rights holder might be better off, in many cases, if the withdrawal purported to eliminate her valid existing rights because just compensation would be available. This is not to say that the holder of a valid existing right is no better off than if she had no right at all. Although the right holder's use or access may be restricted to the point of making development unattractive, *see supra* notes 167-72 and accompanying text, an agency might well be reluctant to impose severe restrictions because a court may view the restrictions as going too far and working a taking, or it may even find that the restrictions violate the more generous standard of unreasonable interference "with enjoyment of the benefit of the right." *See supra* note 169 (discussing this standard which seems to prohibit regulations in addition to those which would act as a taking). For an overview of the valid existing rights issue, *see* Robert B. Keiter, *Defining a Legal Framework for BLM Management*, in *VISIONS OF THE GRAND STAIRCASE*, *supra* note 2, at 93-96 (discussing potential impacts of valid existing rights within the Monument); Barkeley & Albert, *supra* note 164; David Deisley, *Valid Existing Rights: Legal and Practical Realities*, 44 ROCKY MTN. MIN. L. INST. (forthcoming 1998).

173. *See Utah v. Andrus*, 486 F. Supp. 995, 1011 (D. Utah 1979) (holding that the federal government must allow access to a state school section in a wilderness study area, but must not allow that same construction to impair the area's potential wilderness characteristics). *Andrus* is the only case to have directly addressed the issue of a guaranteed right of access across federal land to school trust lands, although its result seems eminently reasonable in light of the purposes underlying school trust lands. *See generally* COGGINS & GLICKSMAN, *supra* note 19, § 10E.03 (discussing state access to landlocked state lands).

174. 486 F. Supp. at 1010.



complex.<sup>175</sup> If the inholding is along an R.S. 2477 right-of-way,<sup>176</sup> access is available but subject to regulation.<sup>177</sup> If not along an R.S. 2477 right-of-way, the inholder will likely need to apply to the BLM for a right-of-way. Under FLPMA, the BLM can choose not to grant the right-of-way<sup>178</sup> or to impose restrictions that will "minimize damage to scenic and aesthetic values and fish and

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175. As one treatise notes:

The law of access to inholdings thus is fragmented and uncertain. National Forest inholders have a right of access according to one interpretation of the ANILCA, but owners of lands within the other land management systems apparently have no statutory rights. The means of access to inholdings in all systems are subject to reasonable regulation at a minimum.

COGGINS & GLICKSMAN, *supra* note 19, § 10E.04[5]

176. R.S. 2477 rights-of-way are the product of a provision of the Mining Law of 1866, which stated that "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands, and for Other Purposes, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified as Rev. Stat. § 2477 (1873)) (recodified as 43 U.S.C. § 932 (1938)), *repealed by* Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, 90 Stat. 2744, 2793 (codified at 43 U.S.C. § 1701 (1994)). This self-executing grant promoted construction of highways across public lands, primarily by local governments and private individuals, by assuring a vested right to any highway constructed. FLPMA repealed this open-ended grant of rights-of-way over public lands, but explicitly protected R.S. 2477 rights-of-way in existence at the time FLPMA was passed. See 43 U.S.C. § 1769(a) (1994). R.S. 2477 rights-of-way have been a source of significant dispute in the West because their existence allows access for development and diminishes the opportunity to designate wilderness, which requires 5000 *roadless* acres. See *supra* note 35 (discussing wilderness criteria). See generally COGGINS & GLICKSMAN, *supra* note 19, § 10E.05[2][b] (reviewing R.S. 2477 right-of-way issues). Illustrative of this debate is the recent dispute over proposed R.S. 2477 regulations by the Department of the Interior. The existence and scope of an R.S. 2477 right-of-way has long been considered a matter of state law. See *Sierra Club v. Hodel*, 848 F.2d 1068 (10th Cir. 1988). But, in 1994, the Interior Department proposed regulations that would have established uniform standards and a process to determine the existence and location of R.S. 2477 claims. See 59 Fed. Reg. 39,216 (1994). Congress, in turn, imposed a moratorium on the regulations, and then passed legislation forbidding new regulations unless approved by Congress. See Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1996); Mitchell R. Olson, Comment, *The R.S. 2477 Right of Way Dispute: Constructing a Solution*, 27 ENVTL. L. 289, 291 & n.13 (1997) (discussing the moratorium and providing citations).

177. Holders of R.S. 2477 rights-of-way have access but that access is still subject to regulation by the land management agency within whose jurisdiction the right-of-way is located. See *Clouser v. Espy*, 42 F.3d 1522, 1538-39 (9th Cir. 1994) (affirming the Forest Service's refusal to allow motorized access along an R.S. 2477 right-of-way to an unpatented mining claim). See generally Philip F. Schuster, II & Roger F. Dierking, *Future Prospects for Mining and Public Land Management: The Federal "Retention-Disposal" Policy Enters the Twenty-First Century*, 26 ENVTL. L. 489 (1996) (discussing *Clouser* and the history of access to mineral claims).

178. See 43 U.S.C. § 1761 (1994).

wildlife habitat and otherwise protect the environment.”<sup>179</sup> Thus, in most cases, even in the absence of direct federal regulatory authority over land use, the BLM will be able to limit activities on land within the Monument by restricting or conditioning access to that land.

Controversy over existing rights within the Monument has centered on the rights of two corporations: Andalex Resources Inc., the Dutch-owned coal company whose federal coal leases were specifically singled out by President Clinton as a reason for establishing the Monument,<sup>180</sup> and Conoco, owner of fifty-nine federal mineral leases within the Monument.<sup>181</sup> Andalex, which held seventeen federal coal leases within the Monument covering about 35,000 acres,<sup>182</sup> had approached Utah in 1989 with a proposal to develop and mine coal on the Kaiparowits Plateau.<sup>183</sup> Utah estimated that the project would create up to 599 jobs with an associated payroll of \$16.7 million annually.<sup>184</sup> It also estimated that the school trust fund would receive approximately \$18 million in royalty payments over the thirty-year life of the mine.<sup>185</sup> Although environmental groups and the Clinton Administration argued rather persuasively that these figures were “significantly inflated,”<sup>186</sup> the figures, along with estimates of

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179. 43 U.S.C. § 1765(a)(ii) (1994) (setting forth the terms and conditions under which the Secretary may permit a right-of-way over BLM lands).

180. See *supra* note 118 (quoting President Clinton's remarks about Andalex's proposed coal mine); see also SECOND HOUSE RESOURCE COMMITTEE REPORT ON GS-ENM CREATION, *supra* note 116.

181. See Brent Israelson, *Conoco Stakes Four Claims in Monument*, SALT LAKE TRIB., June 11, 1997, at B1.

182. See GAO ESTIMATES, *supra* note 103, at 3. The only other coal lease within the Monument was held by PacifiCorp which before the Monument was designated had already begun negotiations with the BLM to exchange the lease for credits to be used in bidding on other federal coal leases. See *id.*

183. See *id.* at 6. The Kaiparowits reserves had been known for a number of years but had been considered too remote to mine profitably. With the construction of a large coal export depot at the Port of Los Angeles, 550 miles by train, profitable production appeared feasible. See Frank Clifford, *Kaiparowits: To Mine or Not to Mine?*, SALT LAKE TRIB., Sept. 9, 1996, at A4.

184. See GAO ESTIMATES, *supra* note 103, at 7-8 (citing 1993 Report of Governor's Office of Planning and Budget). The Governor's office also estimated “that state and local tax revenues from the proposed mine would total about \$108.4 million over the life of the mine.” *Id.*

185. See *id.* at 9 (citing Report of Governor's Office of Planning and Budget).

186. See *id.* at 19 (Department of the Interior's comments to report). An especially trenchant criticism of Utah's figures on Kaiparowits coal came from Interior Solicitor Leshy: “The marketplace has spoken pretty loudly on the value of this coal. I mean, their trillions of dollars of coal numbers is like saying there are

other mineral resources within the Monument,<sup>187</sup> indicate that the economic impact of the Monument was not insignificant and give insight into why local reaction to the Monument was so negative.<sup>188</sup>

Andalex's plan was to begin mining coal in 1996, after a three-year construction period.<sup>189</sup> By the time the Monument was designated, however, Andalex was still working on its EIS, having already spent some \$8 million in its preparation.<sup>190</sup> Although the designation did not formally terminate Andalex's development plans, the use and access restrictions likely to be imposed on Andalex effectively ended its development plans. Thus, it was not particularly surprising that soon after the Monument was designated, Andalex stopped work on the EIS.<sup>191</sup> Then, in January 1997, it formally withdrew its mine application pending

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trillions of dollars of gold in sea water." *The News Hour with Jim Lehrer* (PBS television broadcast, Sept. 18, 1996), available in LEXIS, News Library, NEWSHR file.

187. In 1997, the Utah Geological Survey estimated that the value of all energy and mineral resources within the Monument ranged from \$223 billion to \$331 billion. See GAO ESTIMATES, *supra* note 103, at 3 (reporting on estimates prepared by the Utah Geological Survey and the Governor's Office of Planning and Budget).

188. See *supra* notes 7-8 and accompanying text (discussing local reaction to the Monument). Tourist revenues will, of course, eventually replace some of the income that would have come from mineral extraction, although many local residents are not pleased with the notion of earning their wages in a service economy. See, e.g., Karl Cates, *Boon or Bane?*, SALT LAKE TRIB., Jan. 23, 1997, at B1 (discussing resident's reaction to the trend away from extractive industry jobs and toward service and trade jobs in Kane and Garfield counties); Lee Davidson, *Land-Swap Deal Brings Rare Accord*, DESERET NEWS, May 19, 1998, at B1 (comments of Kane County Commissioner); Brandon Griggs & Brent Israelsen, *Painted Land, Colorful People; A Year Later, Grand Staircase-Escalante National Monument Slowly Unfolds*, SALT LAKE TRIB., Sept. 14, 1997, at J1 (discussing how residents of Boulder, Utah do not want their town "to become 'another Moab'—a less-than-complimentary term meaning congestion, overtaxed infrastructure and uncontrolled growth of motels, condos and fast-food chains"); see also Sarah F. Bates, *Public Lands Communities: In Search of a Community of Values*, 14 PUB. LAND L. REV. 81, 103-04 (1993) (discussing how communities based on resource extraction can resent the transition to a recreation/tourism-based economy). The local residents have already benefitted from some federal funding to be used for planning purposes. See *infra* note 284 and accompanying text (discussing this funding).

189. See GAO ESTIMATES, *supra* note 103, at 6. The proposed underground mine was to have produced about 75 million tons of coal over 30 years. See *id.* The mine site was to have included office and warehouse buildings, coal-storage and truck-loading facilities and a sediment pond. See *id.*

190. See SECOND HOUSE RESOURCE COMMITTEE REPORT ON GS-ENM CREATION, *supra* note 116, at 8.

191. See Mike Gorrell, *It Appears the End Is Near for Andalex Mine Proposal*, SALT LAKE TRIB., Dec. 27, 1996, at B1.

before the Utah Division of Oil, Gas and Mining, declaring that the designation made development of the mine futile.<sup>192</sup> The claim of futility was plainly directed at a takings argument, and since withdrawing its application, Andalex has been negotiating with the Department of the Interior to resolve the issue, most likely by trading its coal leases for other federal assets.<sup>193</sup>

Unlike Andalex, Conoco decided to test its valid existing rights. In February 1997, it announced plans to drill exploratory wells within the Monument on two sites on the Kaiparowits Plateau, one on state school trust lands and the other on federally leased land.<sup>194</sup> Aware of the potentially crippling access restrictions that could be imposed, Conoco proposed to drill on sites adjacent to an existing county road.<sup>195</sup> By March, the Utah Division of Oil, Gas and Mining had issued a permit for drilling on the school trust lands,<sup>196</sup> and in July Conoco began drilling on those lands.<sup>197</sup> Then, in September 1997, the BLM gave its approval for Conoco to drill a well on the federally leased land.<sup>198</sup>

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192. See Jim Woolf, *Andalex Gives up on Kaiparowits Mine*, SALT LAKE TRIB., Jan. 24, 1997, at B1.

193. See *id.* In January of 1998, Andalex submitted to the BLM a report estimating the fair market value of the mine at \$59.5 million. See Jeff Barber, *Report Places Value of Grand Staircase Coal Mine at \$59.5 Million*, INSIDE ENERGY, Jan. 19, 1998, at 13. The BLM intends to engage in further negotiations with Andalex after it reviews the company study or does one of its own. See *id.*

194. See Jim Woolf, *Conoco Wants to Drill for Oil in Escalante Monument: Grand Staircase May Hide Oil Reserves*, SALT LAKE TRIB., Feb. 12, 1997, at A1. Conoco's federal lease granted it the "exclusive right to drill for, mine, extract, remove and dispose of all the oil and gas (except helium) together with the right to build and maintain necessary improvements thereupon for the [10-year] term." See Southern Utah Wilderness Alliance, 141 I.B.L.A. 85, 87 (1997).

195. See *Southern Utah Wilderness Alliance*, 141 I.B.L.A. at 87. The BLM found that

50 miles of existing road will be improved, by blading and resurfacing, as needed, and a 0.1-mile-long spur road from the existing road to the well site will be constructed. The total surface disturbance will be 2.5 acres, of which 2 acres was previously disturbed by oil and gas drilling in 1954 and coal exploration drilling in 1963.

*Id.*

196. See Jim Woolf, *Southern Utah Drilling; Monument May Not Yield Coal, but Oil Could yet Flow*, SALT LAKE TRIB., Mar. 28, 1997, at A1.

197. See Brent Israelsen, *A Year Later, Grand Staircase-Escalante Issues Simmer*, SALT LAKE TRIB., Sept. 14, 1997, at A1; Brent Israelsen, *Conoco Poised to Start Drilling*, SALT LAKE TRIB., July 8, 1997, at B1.

198. See *Southern Utah Wilderness Alliance*, 141 I.B.L.A. at 86; *BLM Okays Conoco Oil Well in Utah Monument; Appeal Filed*, PUB. LANDS NEWS, Sept. 18, 1997, at 2.

Environmental groups vigorously opposed both decisions.<sup>199</sup> Although state law did not allow them to challenge Utah's decision,<sup>200</sup> they did appeal the BLM's decision to the IBLA.<sup>201</sup> They argued that no drilling should be allowed pending completion of the Monument management plan in September 1999.<sup>202</sup> They also made a garden-variety NEPA argument that the BLM's environmental assessment was inadequate and that a full EIS should have been prepared.<sup>203</sup> Both arguments were

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199. See, e.g., Robert Redford, *A Piece of 'God's Handiwork'*, WASH. POST, Nov. 25, 1997, at A19 (op-ed opposing drilling); *infra* notes 199-204 and accompanying text (discussing environmental groups opposition).

200. See Utah Admin. Reg. § R649-10 (1995) (detailing administrative procedures of Board of Oil, Gas & Mining); Denise A. Dragoo & Ruth Ann Storey, *Utah's Oil & Gas Conservation Act of 1983*, 5 J. ENERGY L. & POL'Y 49, 60 (1983) (discussing adjudicatory proceedings before Board of Oil, Gas, & Mining); see also Woolf, *supra* note 196 (noting that because Utah law does not allow a legal challenge, members of the Southern Utah Wilderness Alliance "are bombarding Conoco and its Delaware-based parent company, DuPont, with angry telephone calls and letters").

201. See Southern Utah Wilderness Alliance, 141 I.B.L.A. 85 (1997); *BLM Okays Conoco Oil Well in Utah Monument; Appeal Filed*, PUB. LANDS NEWS, Sept. 18, 1997, at 2 (reporting that several environmental groups, led by the Southern Utah Wilderness Alliance, appealed the BLM's decision to the IBLA on Sept. 12, 1997).

202. See *Southern Utah Wilderness Alliance*, 141 I.B.L.A. at 87-88. Specifically, the Sierra Club argued that under 40 C.F.R. § 1506.1(a) (1998), pending completion of the management plan EIS, no action could be taken that would have an adverse environmental impact or limit the choice of reasonable alternatives. See *Southern Utah Wilderness Alliance*, 141 I.B.L.A. at 89. The IBLA rejected the argument, pointing out that the proposed federal action to be considered in the EIS was the Monument management plan and not the Conoco application, and that, in any event, the project would not "foreclose, or even compromise, any of the BLM's options for managing the overall Monument." *Id.*

203. See *Southern Utah Wilderness Alliance*, 141 I.B.L.A. at 88. In a familiar approach, the environmental groups argued that the BLM's environmental assessment ("EA") had failed to account for a number of potential impacts and had failed to consider reasonable alternatives. See *id.* at 89-93. The IBLA rejected the various NEPA arguments as without merit, concluding that the environmental groups had made "no showing that the approved activity, including improvement of the access road, construction of the spur road, and an increase in industrial traffic, will adversely affect any of the particular natural, historical, or other resources that the Monument is designed to preserve or protect." *Id.* at 88. It is unfortunate that such unlikely arguments about the adequacy of an EA and the need for an EIS are not unfamiliar to NEPA litigation. See R. Timothy McCrum, *NEPA Litigation Affecting Federal Mineral Leasing and Development*, 2 NAT. RESOURCES & ENV'T 7, 7-8 (1986) (criticizing dubious NEPA claims whose primary purpose is merely to delay development). See generally WILLIAM H. RODGERS, ENVTL. LAW § 9.2 at 817-18 (2d ed. 1994) ("More than any of the other environmental statutes the administrative and litigation history of NEPA must be written in large numbers: hundreds of injunctions, thousands of cases, tens of thousands of impact statements, hundreds of thousands of environmental assessments."). Of course, dubious uses of NEPA are not limited to environmental groups. See generally Jonathan M. Cosco,

dubious; and both were rejected by the IBLA.<sup>204</sup> In the end, however, the failure of these claims did not matter. Conoco did not find what it was looking for on the school lands and decided to forego any drilling on the federal lease.<sup>205</sup>

To this point, therefore, the Clinton Administration has not needed to use all of its available legal tools to prevent development within the Monument. Conoco found nothing and the Andalex negotiations are ongoing. Quite possibly, however, more contentious questions of access and use will arise in the future.<sup>206</sup>

### C. *Exchange of State School Trust Lands Within the Monument*

As noted above, at the time the Grand Staircase was designated, Utah had approximately 176,600 acres of school trust lands and 24,165 acres of mineral interests within the Monument.<sup>207</sup> In light of the legal hurdles presented by access and use questions,<sup>208</sup> the best solution for Utah was to negotiate an exchange of its school trust lands and mineral interests for federal lands elsewhere in the state.<sup>209</sup>

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Note, *NEPA for the Gander: NEPA's Application to Critical Habitat Designations and Other "Benevolent" Federal Action*, 8 DUKE ENVTL. L. & POL'Y F. 345, 349 (1998) (discussing how NEPA can be used as a tool for "delaying or even defeating critical habitat designations and other environmentally benevolent federal actions").

204. See *supra* notes 202-03 (discussing these arguments and their rejection by the IBLA).

205. See Jim Woolf, *Conoco May Drill 2nd Well*, SALT LAKE TRIB., Dec. 19, 1997, at B1.

206. In fact, in June 1998, Conoco applied for permits to drill three more wells on state lands within the Monument. See Heather May, *Conoco Applies for Permits to Drill Three Wells in Escalante Monument Despite Previous Failure*, SALT LAKE TRIB., June 27, 1998, at D2. Under the recently agreed upon land exchange, see *infra* Part II.C, these state leases are scheduled to become federal leases. See May, *supra*. Conoco has stated that it has no immediate plans to drill but is acting to protect its leases, thus causing some to suggest that Conoco's application has more to do with drilling "the federal treasury" than drilling for oil. See *id.* (statement of Scott Groene, spokesman for Southern Utah Wilderness Alliance).

207. See *supra* note 139 and accompanying text.

208. See *supra* Part II.B. Utah had previously encountered difficulties in trying to develop in-held lands. See generally Scott T. Evans, Comment, *Revisiting the Utah School Trust Lands Dilemma: Golden Arches National Park?*, 11 J. ENERGY NAT. RESOURCES & ENVTL. L. 347 (1991) (reviewing the controversy surrounding Utah's proposals to market and develop in-held lands within Arches National Park).

209. The authority to exchange in-held school trust lands for other federal lands

President Clinton promised precisely that, vowing "to accelerate the exchange process" and "to resolve reasonable differences in valuation in favor of the school trust."<sup>210</sup> It was easy, however, for Utahns to be skeptical of the hopes for negotiating an exchange. Utah had been down this route before, and, in fact, had long been attempting to negotiate an exchange of the state's in-held lands for other federal lands not subject to the same development and access restrictions.<sup>211</sup> Disputes over valuation, however, had prevented significant exchanges.<sup>212</sup> And in the case of the Grand Staircase, Utah's valuation of its in-held lands was extraordinarily high. The Utah Geological Survey had earlier estimated that revenues to the school trust fund would range from \$1.4 billion to over \$2 billion if all recoverable coal on the

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is provided in FLPMA. See 43 U.S.C. § 1716(a) (1994).

210. *President's Remarks*, *supra* note 118. The President also directed Secretary Babbitt to consult with Governor Leavitt and members of the Utah congressional delegation to form a working group to respond promptly to all exchange requests. See *id.*

211. In 1980, Utah Governor Scott Matheson had initiated Project Bold which proposed to exchange 2.5 million acres of scattered school trust land sections for other federally owned land concentrated in large land blocks. See UTAH DEP'T OF NAT. RESOURCES AND ENERGY, PROJECT BOLD: ALTERNATIVES FOR UTAH LAND CONSOLIDATION AND EXCHANGE (1982). Project Bold never came to fruition, in part because of disputes over valuation of the state lands involved, but also because a variety of interest groups opposed the exchange:

County officials [did not] want to lose their in-lieu payments from the federal government. And stockmen [were] unsure if their grazing permits [would] be perpetuated on state lands at comparable fees being charged on federal lands. Environmentalists also opposed Project BOLD, expressing "doubts about the state's desire to protect 'significant environmental values' on federal lands obtained in a trade."

Evans, *supra* note 208, at 362 (citations omitted). Then, in 1993, Congress passed legislation authorizing an exchange for most of the state's in-held lands within the national parks, national forests, and Indian reservations in the State of Utah. See Utah Schools and Lands Improvement Act of 1993, Pub. L. No. 103-93, 107 Stat. 995 (codified at 31 U.S.C. § 6902 (1994)). Few parcels, however, were ever exchanged, again because the parties could not agree on an appropriate valuation for the lands. See 144 CONG. REC. S5787-89 (daily ed. June 9, 1998) (statement of Sen. Hatch for himself and Sen. Bennett describing valuation problems under Public Law 103-93). Thus, at the time of the Grand Staircase designation, Utahns had little confidence in the possibility of a land exchange. See Marjorie Cortez, *Land Swap? Don't Hold Your Breath, Utahn Says*, DESERET NEWS, Sept. 18, 1996, at A1; Mike Gorrell, *Plenty of Questions—No Real Answers*, SALT LAKE TRIB., Sept. 19, 1996, at A4.

212. See *supra* note 211.

trust lands were developed.<sup>213</sup> The chance for an exchange seemed small.

Despite the history of fruitless negotiations, in May 1998, Interior Secretary Babbitt and Governor Leavitt of Utah announced an agreement to exchange 363,000 acres of school trust lands, including all the school trust lands within the Monument, for \$50 million and 145,000 acres of federal lands elsewhere in the state.<sup>214</sup> As part of the agreement, Utah's School and Institutional Trust Lands Administration ("SITLA") agreed to drop a federal lawsuit seeking disestablishment of the Grand Staircase.<sup>215</sup> The exchange was signed into law on October 31, 1998.<sup>216</sup> It makes significant strides toward healing some of the rifts caused by designation of the Monument, but it does not answer some of the fundamental questions about the manner in which the Monument was created, except perhaps by way of exemplifying a better approach to public lands issues generally. The article returns to that issue in Part III.E.

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213. See GAO ESTIMATES, *supra* note 103, at 8. This estimate is not discounted to net present value. See *id.* at 7 n.16. For criticisms of this estimate, see *supra* note 186.

214. See Brent Israelsen, *Utah, Feds Arrange a Land Swap*, SALT LAKE TRIB., May 7, 1998, at A1; *Hatch Brings School-Trust-Lands Bill to Senate*, SALT LAKE TRIB., June 10, 1998, at A16; *Utah Land Exchange Bill Moving*, PUB. LANDS NEWS, June 19, 1998, at 3. In the swap, the federal government will receive most of the school trust lands within the State's National Parks, National Recreation Areas, Indian Reservations, and National Forests, as originally provided for in the Utah Schools and Lands Improvement Act of 1993. See *supra* note 211 (discussing Public Law 103-93). In addition to the \$50 million, Utah will receive approximately 145,000 acres of valuable federal land in nine Utah counties containing, among other developable resources, some 160 million tons of coal and 185 billion cubic feet of natural gas. See Brent Israelsen, *Leavitt to Sign Pact Today for Land Swap*, SALT LAKE TRIB., May 9, 1998, at D1.

215. See *Hatch Brings School-Trust-Lands Bill to Senate*, *supra* note 214, at A16. The exchange also will settle the ongoing disputes regarding valuation of the various school trust inholdings which Congress had previously designated for exchange under the Utah Schools and Lands Improvement Act of 1993. See 31 U.S.C. § 6902 (1994) (codifying Pub. L. No. 103-93, 107 Stat. 995 (1993)); *supra* note 211 (discussing Public Law 103-93 and this valuation dispute).

216. See Utah Schools and Lands Exchange Act of 1998, Pub. L. No. 105-335, 112 Stat. 3139 (1998); see also 144 CONG. REC. H5072 (daily ed. June 24, 1998) (remarks of Rep. Hansen); 144 CONG. REC. S5788-90 (daily ed. June 9, 1998) (statements of Sens. Hatch and Bennett of Utah on introduced bill).



*D. Legislation Emanating from the Grand Staircase Designation*

A final front of legal response to the Grand Staircase designation has been the introduction of federal legislation to repeal or amend the Antiquities Act. Such legislative efforts in the wake of a president's use of the Antiquities Act are hardly new.<sup>217</sup> In fact, after President Franklin Roosevelt's designation of the Jackson Hole National Monument, Congress amended the Act to exempt the State of Wyoming from any further designations.<sup>218</sup>

In response to the Grand Staircase designation, several pieces of legislation have been introduced in Congress. Senator Bennett of Utah introduced legislation seeking to codify the concessions President Clinton made in his Monument designation.<sup>219</sup> The bill, however, goes one step further and also requires that the Monument be managed under principles of "multiple use and sustained yield."<sup>220</sup> Although the multiple use language has been billed as merely codifying the President's promises,<sup>221</sup> that

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217. For an overview of prior legislative efforts to amend or repeal the Antiquities Act, see Shepherd, *supra* note 78, at 4-25 to 4-33.

218. See 16 U.S.C. § 431a (1994) ("No further extension or establishment of national monuments in Wyoming may be undertaken except by express authorization of Congress."). For an overview of Congress's efforts to repeal the Jackson Hole National Monument designation, see Shepherd, *supra* note 78, at 4-25 to 4-27. The Wyoming exemption simply added an additional process flaw to a statute that already unwisely departed from important principles of public participation and procedural fairness.

219. See S. 357, 105th Cong. (1997). See generally Jim Woolf, *Bennett Puts Clinton's Promises in Writing*, SALT LAKE TRIB., Feb. 25, 1997, at D1.

220. S. 357, 105th Cong. § 4(a)(2) (1997). For definitions of "multiple use" and "sustained yield," the bill refers to FLPMA. FLPMA defines "multiple use" as "a combination of balanced and diverse resource uses that takes into account the long-term needs of future generations for renewable and nonrenewable resources including, but not limited to, recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values." 43 U.S.C. § 1702(c) (1994). It defines "sustained yield" as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use." *Id.* § 1702(h). These definitions of "multiple use" and "sustained yield" are, of course, quite elastic. That elasticity is precisely what has allowed for so much resource development on the public lands under the "multiple use" banner. See generally COGGINS & GLICKMAN, *supra* note 19, § 16.01 (reviewing multiple use, sustained yield law); George C. Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of "Multiple Use, Sustained Yield" for Public Land Management*, 53 U. COLO. L. REV. 229 (1982) (reviewing history of multiple use management).

conclusion is a stretch. In truth, the President's careful use of the term "multiple use," a public lands term of art, in his speech at the Grand Canyon<sup>222</sup> was likely only an election-season shading of what was otherwise a plain effort to eliminate multiple use in the Monument area. If multiple use management were truly employed within the Monument, it would allow mining,<sup>223</sup> which is precisely what President Clinton said elsewhere in his speech that he wanted to prevent.<sup>224</sup> The bill seems unlikely to achieve passage.<sup>225</sup>

In addition to Senator Bennett's management bill, no less than seven bills have been introduced in Congress seeking to limit the President's power to designate national monuments. Two of the bills are similar to the Antiquities Act amendment that exempted Wyoming, in that they are merely a particular representative's effort to avoid having his state's ox gored.<sup>226</sup> One bill provides for several minor adjustments to the Monument's boundaries.<sup>227</sup> Four bills, in contrast, constitute broad attacks on the Antiquities Act. The National Monument Fairness Act of 1997,<sup>228</sup> introduced by Representative Hansen of Utah and actually passed by the House,<sup>229</sup> and a companion Senate bill of the same name, introduced by Senator Hatch of Utah,<sup>230</sup> would

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221. See 143 CONG. REC. S1571 (daily ed. 1997) (statement of sponsor, Sen. Bennett); Jim Woolf, *Bennett Puts Clinton's Promises in Writing*, SALT LAKE TRIB., Feb. 25, 1997, at D1.

222. See *President's Remarks*, *supra* note 118 (promising that the Monument would "remain open for multiple uses including hunting, fishing, hiking, camping and grazing" (emphasis added)).

223. See *supra* note 220 (discussing multiple use principles).

224. See *President's Remarks*, *supra* note 118 ("[W]e can't have mines everywhere, and we shouldn't have mines that threaten our national treasures."); Proclamation No. 6920, 61 Fed. Reg. 50,223, 50,225 (1996) (withdrawing all federal land from "entry, location, selection, sale, leasing or other disposition").

225. If passed by Congress, the bill would surely be vetoed by President Clinton because of its multiple use language, and, in any event, the bill has not made it out of committee during the 105th Congress. See *Bill Digest: Congress Research Service*, available in LEXIS, Legis library, BLTRCK file.

226. See Idaho Protection Act of 1997, S. 62, 105th Cong. (sponsored by Sen. Craig) (exempting Idaho from the Act); H.R. 413, 105th Cong. (1997) (sponsored by Rep. Hastings) (exempting Washington from the Act).

227. See H.R. 3909, 105th Cong. (1998) (sponsored by Rep. Cannon of Utah).

228. See H.R. 1127, 105th Cong. (1997); see also 143 CONG. REC. H8398 (daily ed. Oct. 6, 1997) (Rep. Hansen's remarks on bill).

229. The bill was passed by the House on October 7, 1997. See 143 CONG. REC. H8502 (daily ed. Oct. 7, 1997).

230. See S. 477, 105th Cong. (1997); see also 143 CONG. REC. S2563 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch introducing bill).

require an act of Congress to establish any national monument over 50,000 acres.<sup>231</sup> Representative Chenoweth of Idaho also introduced a bill requiring an express act of Congress to create a national monument.<sup>232</sup> A third approach was offered by Senator Murkowski of Alaska. His Public Lands Management Participation Act of 1997 provides for public notice and requires compliance with all applicable federal land management and environmental statutes.<sup>233</sup>

In light of the history of failed efforts to repeal the Antiquities Act and in the face of an almost certain presidential veto, it is unlikely that any of these bills will become law. But even if that is so, the legislation does a valuable service of renewing the debate about the appropriate level of political process and public participation in public lands decisions. It is to that debate, and more generally to the question of an appropriate ethic of public lands protection, that this article now turns.

### III. LESSONS FROM THE CREATION OF THE GRAND STAIRCASE

In the wake of the various legal controversies engendered by the designation of the Grand Staircase-Escalante National Monument, it seems appropriate to ask: was it the right thing to do? As someone who has hiked its canyons with my children and explored its treasures with my father, I admit to a strong preference for its protection from significant development.<sup>234</sup> But

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231. See H.R. 1127, 105th Cong. (1997). As originally introduced, the maximum acreage for presidential designation was 5000 acres but the bill was amended by the House to allow designations of up to 50,000 acres. See 143 CONG. REC. H8413 (daily ed. Oct. 6, 1997). The bill gives the President authority to designate only 50,000 acres per state per year. To the extent he exceeds that figure, he must solicit the comments of the appropriate governor, and Congress must approve the proclamation within two years by joint resolution. See H.R. 1127, 105th Cong. (1997).

232. See H.R. 596, 105th Cong. (1997) (requiring a congressional act for any national monument, regardless of size).

233. See S. 691, 105th Cong. (1997).

234. My own experience confirms Aldo Leopold's eloquent observation about the value of wild lands:

What value has wildlife from the standpoint of morals and religion? I heard of a boy once who was brought up an atheist. He changed his mind when he saw that there were a hundred-odd species of warblers, each bedecked like to the rainbow, and each performing yearly sundry thousands of miles of migration about which scientists wrote wisely but did not understand. No "fortuitous concourse of elements" working blindly through any number of millions of years could quite account for why warblers are so beautiful. No mechanistic theory, even bolstered by mutations, has ever quite answered for the colors of the cerulean warbler,

focusing on whether the many wonders of the Grand Staircase are worth preserving ultimately fails to answer the question. Whether protecting those areas was proper depends only partially on the result, and at least as much on the way in which the result was achieved. On that question, the debate is closer. This portion of the article thus explores the question whether the process by which the Grand Staircase was designated was appropriate, or whether it needs to be changed.

As suggested, it is unlikely that the designation will be found to have violated existing law.<sup>235</sup> But that should not end the inquiry into its suitability. If there is one thing legal history teaches, it is that legality is not an adequate proxy for virtue. Thus, in questioning whether the Grand Staircase designation was "appropriate," this section of the article focuses not on whether opponents of the Monument will prevail in court, but on identifying the basic principles that should guide withdrawal decisions and preservation advocacy more generally.

To identify the guideposts that should inform withdrawal decisions, one need look no further than the principles that should inform our interaction with wild lands once they are protected. Drawing from wilderness literature, particularly from Joseph Sax's thought-provoking exposition in *Mountains Without Handrails* of what he terms the "preservationist position," and Aldo Leopold's profound commentary in *A Sand County Almanac* on ethical interaction with wild lands,<sup>236</sup> the next part of this

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or the vespers of the woodthrush, or the swansong, or—goose music. I dare say this boy's convictions would be harder to shake than those of many inductive theologians. There are yet many boys to be born who, like Isaiah, "may see, and know, and consider, and understand together, that the hand of the Lord hath done this." But where shall they see, and know, and consider? In museums?

ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 230-32 (Ballantine Books 1970) (1966).

235. See *supra* Part II.A. Two student notes have addressed the question of the legality of the designation of the Monument. See Ann E. Halden, Note, *The Grand Staircase-Escalante National Monument and the Antiquities Act*, 8 *FORDHAM ENVTL. L.J.* 713 (1997) (arguing that the designation was a proper exercise of the Antiquities Act); Paul Veravanich, Note, *The Propriety of President Bill Clinton's Establishment of the Grand Staircase-Escalante National Monument*, 20 *ENVIRONS ENVTL. L. & POL'Y J.* 2 (1996) (arguing that the President's use of the Antiquities Act was permissible and beneficial to Utah's economy); see also Colin Foley, *The Grand Staircase-Escalante National Monument: Balancing Public and Private Rights in the Nation's Lands*, 25 *B.C. ENVTL. AFF. L. REV.* 743 (1998) (reviewing miscellaneous public land laws relating to the Monument's designation).

236. See SAX, *supra* note 16; LEOPOLD, *supra* note 234. For a general review of *MOUNTAINS WITHOUT HANDRAILS*, see A. Dan Tarlock, *For Whom the National Parks*,

article identifies the basic virtues that should govern our interaction with wilderness—virtues such as sportsmanship, deliberation, restraint, sensitivity to impact, and patient woodcraft. It then explores whether the designation of the Grand Staircase conformed to those virtues. Ultimately, if the value of wilderness is its ability to teach, or at very least provide the setting for, “redeeming” behavior,<sup>237</sup> it simply will not do to acquire that wilderness by anything other than application of the same principles. Unfortunately, in the case of the Grand Staircase, the very virtues that are properly extolled by preservationists in advocating how man should interact with wild lands seem to have been largely violated in their acquisition.

#### A. *Virtuous Interaction with Wilderness*

Although it would be difficult to articulate a specific catechism of wilderness values, wilderness literature reflects agreement on certain basic virtues that should govern our interaction with wild lands. The overarching virtue described in the literature is that “the chase, not the catching, is paramount.”<sup>238</sup> The actual result of any particular endeavor is secondary to the endeavor itself. Thus, as Sax discusses, in recreational literature on fishing, the common message is that the joys of angling have little to do with catching fish. “Fishing is most satisfying, not when it results in accomplishment of a set task, but in refining us.”<sup>239</sup> The essence of mountaineering is not simply summiting, but climbing by the appropriate method.<sup>240</sup>

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34 STAN. L. REV. 255 (1981) (book review).

237. See SAX, *supra* note 16, at 103.

238. RODERICK NASH, WILDERNESS AND THE AMERICAN MIND 247 (1967) (describing William Faulkner's message in *The Bear*).

239. SAX, *supra* note 16, at 28 (“[T]he secret of fishing is to be ‘content to not-catch fish in the most skillful and refined manner.’” *Id.* (quoting ALBERT MILLER, FISHLESS DAYS, ANGLING NIGHTS xiii (1971))); see also FROME, *supra* note 35, at 13 (“The fisherman, rather than being concerned with the catch itself, focuses on the challenge; even when fish are few and scattered, he finds rewards in the setting and in his feeling of harmony with the flows of weather, wind, and water.”). Thoreau's comments in *Walden* are to the same effect. He laments that those who came to Walden and did not catch any fish were disappointed, even though “they had the opportunity of seeing the pond all the while. They might go there a thousand times before the sediment of fishing would sink to the bottom and leave their purpose pure; but no doubt such a clarifying process would be going on all the while.” HENRY DAVID THOREAU, WALDEN 218 (The Heritage Press 1939) (1849).

240. See SAX, *supra* note 16, at 37 (“[I]n great mountaineering, the result, the

Likewise, rafting a river is about more than just roaring to the bottom of some predetermined route, led by a river guide who handles the rafts and prepares gourmet meals. At its best, river rafting involves a slower-paced exploration of the canyon where the rafter encounters the wilderness rather than simply controlling or overpowering it.<sup>241</sup> Hunting is the same. It is not enough simply to kill the prey. The hunt is most satisfying when it relies on subtle woodcraft and is not overaided by technology.<sup>242</sup>

With respect to each wilderness venture, accomplishment is not a function of conquest but of virtuous method. Wilderness literature thus emphasizes the principle of understanding our surroundings, as opposed to simply dominating them.<sup>243</sup>

reaching of a summit, is of minor importance . . . the whole merit of the climb depend[s] upon the way it was done, that is the method, behavior and mental attitude of the climbers. . . ." (quoting GALEN ROWELL, *IN THE THRONE ROOM OF THE MOUNTAIN GODS* 147 (1977)); see also JON KRAKAUER, *INTO THIN AIR* 20 (1997) ("Getting to the top of any given mountain was considered much less important than *how* one got there: prestige was earned by tackling the most unforgiving routes with minimal equipment, in the boldest style imaginable."); LAURA WATERMAN & GUY WATERMAN, *WILDERNESS ETHICS* 208 (1993) ("A few years ago an Italian party used helicopters to help them climb Mount Everest. The mountaineering world was aghast. What was the object? Why not just build a gondola to the top? . . . [R]isk and challenge is why climbers go to the mountains.").

241. See SAX, *supra* note 16, at 94-96 (advocating this subtler rafting experience and describing the promotional literature of the many commercial rafting adventures that claim to provide an almost resort-like experience).

242. See SAX, *supra* note 16, at 32-33; Ted Williams, *The Baiting Game*, *AUDUBON*, May 15, 1997, at 28 (praising those "who enjoy hunting migratory birds without bait—who take the time to read water, wind, and law; who can work a circling drake pintail with a call, coaxing him down out of an icy autumn dawn . . . who have always believed that there can't be any thrill to the chase if there is no chase"); THEODORE ROOSEVELT, *THE WILDERNESS HUNTER* xv (1893) ("In hunting, the finding and killing of the game is after all but a part of the whole" and "[t]he free, self-reliant, adventurous life, with its rugged and stalwart democracy; the wild surroundings, the grand beauty of the scenery, the chance to study the ways and habits of the woodland creatures—all these unite to give to the career of the wilderness hunter its peculiar charm."); *id.* at 19 ("Hunting in the wilderness is of all pastimes the most attractive, and it is doubly so when not carried on merely as a pastime. Shooting over a private game preserve is of course in no way to be compared to it.").

243. See JOHN MUIR, *THE EIGHT WILDERNESS DISCOVERY BOOKS* 593 (1992) ("Nearly all my mountaineering has been done on foot, carrying as little as possible, depending on camp-fires for warmth, that so I might be light and free to go wherever my studies might lead."); FROME, *supra* note 35, at 13 ("The wilderness hunter, learning the habits of animals and meeting the prey on its own ground, appreciates the stillness, physical exercise, woodlore, the pride in roughing it, the kill that comes

Similarly, the literature encourages avoiding undue impact on wild lands<sup>244</sup> and exercising self-restraint, most often by self-limitation of technological advantage. As Aldo Leopold wrote:

Voluntary adherence to an ethical code elevates the self-respect of the sportsman, but it should not be forgotten that voluntary disregard of the code degenerates and depraves him. Our tools for the pursuit of wildlife improve faster than we do, and sportsmanship is a voluntary limitation in the use of these armaments. It is aimed to augment the role of skill and shrink the role of gadgets in the pursuit of wild things.<sup>245</sup>

Leopold's use of the term "sportsmanship" is perhaps as good as any to describe the "ethical code" that should govern our interaction with wild things. His message, and the message that is pervasive in wilderness literature, is that relying on experience, patient woodcraft, and subtle comprehension of one's natural surroundings has a redeeming quality that is lacking where the result is assured by technology or gadgetry.<sup>246</sup>

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hard, rather than easy.").

244. See, e.g., FROME, *supra* note 35, at 97 ("All the outdoor clubs have been deeply concerned and are developing various guidelines and codes of ethics for their members. They urge wilderness travelers . . . to try not to tread unnecessarily on delicate plants that make up fragile alpine communities . . . to respect the natural environment and treat it gently."); U.S. DEP'T OF AGRIC. FOREST SERV., U.S. DEP'T OF INTERIOR NAT'L PARK SERV., AND U.S. DEP'T OF INTERIOR BUREAU OF LAND MANAGEMENT, LEAVE "NO TRACE" LAND ETHICS (1993) ("'No Trace' guidelines have been designed, to aid in the protection of all back country and wilderness areas. By following these guidelines, we can better protect the land and lessen the sights and sounds of our visit."); Jim Gorman, *Leave No Trace: A New Wilderness Ethic*, BACKPACKER, Apr. 1998, at 68 (praising the federal wilderness "Leave No Trace" program); GEORGE AND IRIS WELLS, THE HANDBOOK OF WILDERNESS TRAVEL 69-71 (Harper & Brothers 1956) ("Be so clean a camper that no one else can tell you have passed this way.").

245. LEOPOLD, *supra* note 232, at 212; see also *id.* at 232 ("[T]he ethics of sportsmanship is not a fixed code, but must be formulated and practiced by the individual, with no referee but the Almighty."); SAX, *supra* note 16, at 15 (contending that "self-restraint" is one of the values which preservationists believe interaction with wild lands promotes).

246. See, e.g., SAX, *supra* note 16, at 32; *id.* at 37 ("Climbing literature] affirms the proposition that climbing with a few classic tools that become extensions of the body is quite conducive to the sought-after feeling; using a plethora of gadgets is not.") (quoting GALEN ROWELL, IN THE THRONE ROOM OF THE MOUNTAIN GODS 111 (1977)); *id.* at 39 (suggesting that the purpose of setting forth rules for the "climbing game" is "to conserve the climber's feeling of personal (moral) accomplishment against the meaninglessness of a success which represents merely technological victory" (quoting Lito Tejada-Flores, *Games People Play*, ASCENT 23-25 (1964))).

*B. Virtuous Acquisition of Wilderness and Public Participation in the Withdrawal Process*

At a broad level of abstraction, the key to virtuous interaction with wild lands is an understanding that the method employed, and not the result achieved, is what ennobles the participant.<sup>247</sup> Because virtue generally should not be situational or geographic, it is instructive to ask what this same principle implies for the task of wilderness advocacy and acquisition. Translated into the context of wilderness advocacy, the principle that accomplishment is more a function of method than conquest suggests the necessity of a fair withdrawal process. For disregard of due process in withdrawing public lands devalues the withdrawal just as surely as "disregard of the code [of wilderness virtues] degenerates and depraves"<sup>248</sup> the sportsman. But what exactly does a fair withdrawal process entail?

A fair or—to borrow from Leopold—sportsmanlike withdrawal process should, as an initial matter, allow for public participation. Soliciting input from those connected to the land emulates the wilderness virtue of seeking understanding rather than domination.<sup>249</sup> Such understanding, of course, has more than an aesthetic purpose. Allowing public comment makes it more likely that unforeseen benefits and detriments of any withdrawal will be taken into consideration.<sup>250</sup> With public participation, those opposed to the withdrawal are more likely to accept the result if they have had an opportunity to participate in the development of the withdrawal proposal.<sup>251</sup> That the

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247. See *supra* notes 238-46 and accompanying text. The same truth is articulated by every parent who tells his or her little-leaguer, "it's not whether you win or lose, but how you play the game." See also *Mark* 8:36 ("For what shall it profit a man, if he shall gain the whole world, and lose his own soul?").

248. LEOPOLD, *supra* note 234, at 212.

249. See *supra* note 243.

250. For a thorough discussion of issues surrounding public participation in federal land management decisions, see Gail L. Achterman & Sally K. Fairfax, *Public Participation Requirements of the Federal Land Policy and Management Act*, 21 ARIZ. L. REV. 501 (1979). Increased public participation in federal land management decisions was one of the key recommendations of the Public Land Law Review Commission. See U.S. PUBLIC LAND LAW REV. COMM'N, *supra* note 78, at 57.

251. Public participation is not, of course, a panacea for resolving public lands disputes. Sarah Bates has pointed out that "the typical public hearing is structured to discourage the kind of dialogue necessary to reach consensus. Although plenty of opportunity exists to speak and submit written comments, members of the public may feel that their opinions are little more than chits on a tally sheet." Bates, *supra*



withdrawal process should include public participation does not seem particularly controversial. In fact, public participation in western public lands decisions has been championed by Interior Secretary Babbitt,<sup>252</sup> Interior Solicitor Leshy,<sup>253</sup> and the Clinton Administration.<sup>254</sup>

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note 188, at 91. Indeed, Achterman and Fairfax have suggested that the basic assumptions underlying public participation—that public involvement will lead to wiser decisions and greater acceptance by the public—are “largely unfounded.” See Achterman & Fairfax, *supra* note 250, at 507-08 (noting that public involvement programs may actually “mobilize dissent and heighten polarization, public frustration, and dissatisfaction”). Nevertheless, they conclude that the real need is for the BLM to recognize the limitations of public involvement and to develop public participation procedures that are more efficient. See *id.* at 532-38. Ultimately, it is hard to argue that public involvement does not have limitations, but that fact should not obscure that even inefficient and limited public participation is superior to no participation at all.

252. See Bruce Babbitt, *Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion*, 12 ENVTL. L. 847, 858-59 (1982) (“The federal government should share responsibility with the states in its capacity as landowner, as well as in its sovereign capacity. . . . In particular, it has a responsibility to insure that the interests of those with whom it shares the West are represented in the decisionmaking process.” (footnote omitted)); *id.* at 861. (“The states should have a guaranteed voice in decisions that affect their future. Statutes and administrative policies that allow for state concurrence with federal land use decisions will help to achieve this goal.”); *id.* (“Both the states and the federal government share a common trust: the public good. They ought to be collaborators rather than adversaries. By working toward a truly cooperative regime of public land management, they may improve both the public welfare and the health of the intergovernmental system.”).

253. In 1995 Solicitor Leshy had stated:

A second theme [of the Clinton Administration] has been a healthy respect for federalism. This cannot be a surprise from an administration headed by a former governor and a state attorney general, whose DOI Secretary has a similar background. But even apart from the shared belief that not all public policy wisdom emanates from Washington, D.C., cooperative federalism is a policy and political necessity.

John D. Leshy, *Natural Resources Policy in the Clinton Administration: A Mid-Course Evaluation from the Inside*, 25 ENVTL. L. 679, 681 (1995); see also John D. Leshy, *Granite Rock and the States' Influence over Federal Land Use*, 18 ENVTL. L. 99, 114 (1987) (advocating federal agency preemption of some state regulatory control over the public lands “if the federal agencies use a process that ensures state interests are heard and accounted for”).

254. For example, President Clinton stated:

This bill is the result of extensive negotiations by my Administration, the Congress, and environmental and sportsmen's groups. Starting from widely differing positions, they worked intensively to reach the compromise reflected in this legislation. The bill is proof that when there is a shared commitment to do what is right for our natural resources, partisan and ideological differences can be set aside and compromises can be negotiated for the benefit of the common good. . . . I hope and trust the process by which this bill was enacted will serve as a model for future congressional action on other environmental measures.

33 WEEKLY COMP. PRES. DOC. 1535 (Oct. 9, 1997); see also Jerry Spangler, *Monument*

Despite the general agreement on the virtue and value of public participation, in the case of the Grand Staircase withdrawal, the Clinton Administration worked assiduously to avoid it, keeping the Monument plans secret up until the last minute.<sup>255</sup> Why did the Administration depart from the very virtue it had preached as a necessity in other contexts? The Administration's reply might be that the secrecy was necessary because the Monument might have been derailed by notice of the Administration's intentions.<sup>256</sup> This claim seems dubious. Although the political cost may have been higher, President Clinton could have accomplished the withdrawal without keeping it a secret.<sup>257</sup> In truth, the argument that the designation may have been derailed by public notice is only a claim that the Administration could not have achieved its objective as easily. The argument is akin to that of the occasional tourist who demands roads in every wilderness area, because otherwise access to various natural attractions would be difficult or time-

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*Sparks Accord, Shea Says*, DESERET NEWS, Apr. 17, 1998, at B1 (BLM Director Patrick Shea noting that resolution of environmental conflicts will only come through a spirit of compromise that includes citizen participation from all sides of the debate but stating that he does not see the lack of public participation in the Grand Staircase designation "as a contradiction").

255. See *supra* notes 128-33 and accompanying text.

256. See 143 CONG. REC. 8398, 8412 (Oct. 6, 1997) (letter from Secretary Babbitt suggesting that public notice would increase the chances that companies would stake mining claims or carry out other development that could impair the ability of the President to designate the Monument); *Statement of John Leshy, Solicitor, Department of the Interior, Before the Senate Committee on Energy and Natural Resources*, Feb. 12, 1998 (1998 WL 8992137) (making this argument).

257. The notion that the President would have lost the ability to withdraw the lands is something of a red herring. Some of the land in the Monument was already protected by virtue of its wilderness study area status. See *supra* note 139 and accompanying text (describing percentage of land within Grand Staircase identified as WSAs); *supra* note 39 and accompanying text (describing protected status of WSAs). Moreover, the Interior Secretary could have first proposed to withdraw the lands under FLPMA and in his proposal segregated the lands from the operation of the public land laws. See 43 U.S.C. § 1714(b)(1) (1994). Alternatively, the Secretary could have used the emergency withdrawal provision of FLPMA to withdraw the land for three years while the possibility of using the Antiquities Act was considered. See 43 U.S.C. § 1714(e) (1994) (FLPMA emergency withdrawal provision); 43 C.F.R. § 2091.5-2093 (1998) (setting forth segregative effect of emergency withdrawal); see also Shepherd, *supra* note 78, at 4-39 to 4-40 (refuting idea that executive withdrawal is necessary to act quickly to protect lands from threatened damage). The availability of FLPMA's emergency provisions also makes dubious the claim that the possibility of Andalex's mining was what made necessary reliance upon the Antiquities Act. See also *supra* note 118 (discussing whether the Andalex mine was as great a threat to the Kaiparowits Plateau as President Clinton suggested).

consuming. Just as the absence of a road poses a difficulty but promotes virtuous wilderness interaction,<sup>258</sup> the process of public participation is time consuming but results in a more thoughtful and virtuous withdrawal.

The Administration might also reply that public participation was unnecessary because the law, specifically the Antiquities Act, did not require it.<sup>259</sup> This claim is accurate but begs two questions: should the Antiquities Act be repealed or amended; and, in any event, should legal proscription be the only limit on the withdrawal process? The article returns to both of these questions below, answering the first in the affirmative and the second in the negative.<sup>260</sup> In the meantime, it is sufficient to say that whatever the law requires, seeking input from those attached to the land is a basic virtue that was largely disregarded in the establishment of the Grand Staircase.<sup>261</sup>

### C. *Virtuous Acquisition of Wilderness and Respect for Existing Communities*

A fair or virtuous withdrawal process would not only include opportunities for public input, but would actually weigh and consider that input, particularly as it relates to the needs and cultural heritage of existing communities. Achieving protected

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258. See JOHN MUIR, THE EIGHT WILDERNESS DISCOVERY BOOKS 571 (1992) ("Little, however, is to be learned in confused, hurried tourist trips, spending only a poor noisy hour in a branded grove with a guide. You should go looking and listening alone on long walks through the wild forests and groves in all seasons of the year."); SAX, *supra* note 16, at 79-80 (arguing that the purpose of reserving natural areas "is not to keep people in their cars, but to lure them out").

259. See *supra* notes 97-102 and accompanying text (explaining that Antiquities Act designations do not require public notice).

260. See *infra* Parts III.D, III.E.

261. The Administration could perhaps also argue that public participation was unnecessary because there had already been significant public input during the congressional debates on the Utah wilderness bill and before that on the FLPMA section 603 process. See 143 CONG. REC. H8283 (daily ed. Oct. 1, 1997) (remarks of Rep. Miller of California making this argument); John D. Leshy, *Putting the Antiquities Act into Perspective*, in VISIONS OF THE GRAND STAIRCASE, *supra* note 2, at 86-87 (Interior Solicitor Leshy's articulation of this argument); see also *supra* Part I (discussing Utah wilderness wars). But the participants in that debate did not have an opportunity to address the impacts and benefits of all the specific lands designated within the Monument, and the essence of due process is to be informed of the precise action government might take. Moreover, as discussed below, even if the President thought he knew the entire debate, public participation has important purposes beyond educating the decision maker.

status for public lands is, at very least, a disquieting victory if the withdrawal simply leaves existing communities in its wake, alienated and struggling to stay afloat.

Mountaineering literature's concerns about recent Mount Everest expeditions are an apt metaphor for such disquieting victories. In the rush to scale the world's highest peak, unqualified climbers use professional guides,<sup>262</sup> caution is thrown to the wind, and the mountain itself is abused, littered with empty oxygen canisters, abandoned gear, and, more and more of late, bodies.<sup>263</sup> Everest, mountaineering's highest achievement, has become a symbol for the trophy recreationist who cares nothing for method as long as he can point to achievement.<sup>264</sup> A withdrawal process that focuses on the size of the withdrawal to the exclusion of the interests of local communities is little different. In truth, it is much like trophy hunting: as long as the achievement can be figuratively placed on the nation's mantle, the impact<sup>265</sup> or purpose<sup>266</sup> of the hunt matters little.<sup>267</sup>

262. See Rod Nordland, *The Gods Must Be Angry*, NEWSWEEK, May 26, 1997, at 45 (describing the guided tours up Everest and a base camp "cushier than ever, supplied by daily chopper flights, with video movies and propane heaters in some of the tents. The Malaysians even had Coca-Cola packed in by Sherpas, while camp caterers cranked out bagels, pizza and sushi"); see also KRAKAUER, *supra* note 240 (describing the 1996 Mount Everest disaster in which a number of climbers on professionally guided trips died when caught in a storm near the summit); *id.* at 23. ("Traditionalists were offended that the world's highest summit was being sold to rich parvenus—some of whom, if denied the services of guides, would probably have difficulty making it to the top of a peak as modest as Mount Rainier.").

263. See Bhola Rana, *Money Hitch to Clean up Everest*, BERNAMA, May 15, 1998, available in 1998 WL 6598208 (quoting Nepal officials that one clean-up expedition brought back two tons of rubbish and that "[w]e will probably have to mount two expeditions to clear the mountain of empty oxygen cylinders, human bodies and even remains of a crashed Italian helicopter"). In truth, the clean-up problem has been lessened in the last few years due to the efforts of several expeditions to bring down trash, although much remains to be done. See KRAKAUER, *supra* note 240, at 60, 161 (describing these recent efforts).

264. Aldo Leopold describes the "trophy-recreationist" as a person who "must possess, invade, appropriate." LEOPOLD, *supra* note 234, at 267-68; see also JOHN STEINBECK & EDWARD F. RICKETTS, *SEA OF CORTEZ: A LEISURELY JOURNAL OF TRAVEL AND RESEARCH* 166 (1971) ("We have never understood why men mount the heads of animals and hang them up to look down on their conquerors. Possibly it feels good to these men to be superior to animals but it does seem that if they were sure of it they would not have to prove it.").

265. See *supra* note 244 and accompanying text (discussing how minimizing impact on nature is consistently emphasized in wilderness literature).

266. Hunting literature is replete with the argument that hunting is most virtuous and fulfilling when it is done for the purpose of obtaining sustenance. See, e.g., ROOSEVELT, *supra* note 242, at 19 ("Among the hunts which I have most enjoyed

There was certainly an element of trophy hunting in the Grand Staircase designation. As Leopold wrote: "A peculiar virtue in wildlife ethics is that the hunter ordinarily has no gallery to applaud or disapprove of his conduct. Whatever his acts, they are dictated by his own conscience, rather than by a mob of onlookers."<sup>268</sup> Contrast this "peculiar virtue of wildlife ethics" with the overemphasis on political benefit that characterized the deliberations leading up to the designation of the Grand Staircase.<sup>269</sup> The very structure of the Antiquities Act allows the President to act as "dictated by his own conscience," yet the President seemed more concerned about the "mob of onlookers." It is for this same reason that there was something discouraging about the President making his proclamation at the Grand Canyon rather than in the Canyons of the Escalante. The gallery would certainly have been less, but standing on the quieter and more remote lands of the Grand Staircase would have been a powerful symbol of why conscience, not politics, demanded their protection. Perhaps the detour to a remote area of Utah is a lot to ask during the hectic period of a presidential campaign, but the whole message of wilderness is that the quiet and deliberate is to be valued over the noticeable and expedient.

Recognizing the importance of the impact of public lands decisions on local communities should also be understood as a manifestation of another insight of wilderness literature:

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were those made when I was engaged in getting in the winter's stock of meat for the ranch, or was keeping some party of cowboys supplied with game from day to day."); George Reiger, *As Others See Us: How Are Sportsmen Really Perceived by Others . . . And What Can We Do to Improve the Image?*, FIELD AND STREAM, Apr. 1996, at 19 (citing a survey by Yale psychologist Stephen Kellert finding that "while 85 percent of the public accepts hunting when it's done for meat only, the approval rating drops to 64 percent when 'recreation' is mentioned as a supplemental motive for going afield," and that, "half the people polled . . . *strongly opposed* hunting if it's primarily done for 'sport,' and 82 percent objected if its sole purpose is a trophy").

267. Decrying the growth of trophy hunting, one recreation author stated:

Recently, however, some hunters have overstepped the bounds of friendly competition and redefined deer hunting as an outright trophy quest in which nothing—not circumstances, effort, luck, or coincidence—matters more than score. If this year's rack doesn't rack up more points than last year's, the hunt was a bust. That's a frightening attitude, really, and blatantly disrespectful to the animal.

Doug Pike, *The True Measure of a Buck*, FIELD AND STREAM, June 1998, at 13. The quest for more wilderness acreage should not become like the never-ending quest for the larger buck.

268. LEOPOLD, *supra* note 234, at 197.

269. See *supra* notes 124-27 and accompanying text.

civilization is not an evil imposition on the good of wilderness. Rather, as Robert Marshall, founder of The Wilderness Society, put it, preservation decisions precipitate a conflict "between genuine values."<sup>270</sup> The "remedy" to that conflict, suggested Henry David Thoreau, "is to be found in the proportion which the night bears to the day, the winter to the summer, thought to experience."<sup>271</sup> In the end, it is civilization that makes possible the savoring of wilderness and wilderness that makes possible the appreciation of civilization.<sup>272</sup>

Ultimately, the task in public lands decision making is to find a balance between the competing benefits of wilderness and civilization. Leopold expressed this effort to find a balance this way:

What I am trying to make clear is that if in a city we had six vacant lots available to the youngsters of a certain

270. NASH, *supra* note 238, at 205 (quoting Robert Marshall, *The Universe of Wilderness Is Vanishing*, 29 NATURE MAGAZINE 240 (1937)). Elsewhere, Marshall noted that "[t]he world . . . cannot live on wilderness, except incidentally and sporadically." SAX, *supra* note 16, at 43 (quoting ROBERT MARSHALL, ALASKA WILDERNESS 165 (1973)). This same sentiment has been expressed by numerous other wilderness writers. See, e.g., NASH, *supra* note 238 (tracing the tension between wilderness and civilization from its roots in the conflict between the Enlightenment and Romanticism and between Puritanism and Primitivism); Mark Sagoff, *On Preserving the Natural Environment*, 84 YALE L.J. 205, 226-44 (1974) (discussing same). I suspect that most of us have both romantic and neoclassical inclinations. We esteem ordered beauty suggestive of man's intellectual and artistic prowess but also prize tangled, complex beauty suggestive of the vastness, complexity and sublimity of nature.

271. NASH, *supra* note 238, at 92 (quoting *Walking*, in 9 THE WRITINGS OF HENRY DAVID THOREAU 258 (1893)).

272. This insight is proffered by Roderick Nash in his superb book *Wilderness and the American Mind*. See *supra* note 238. There, he comments on a passage in Sigurd Olson's book, *Listening Point*:

Its eighteenth chapter, "The Whistle," described his thoughts on hearing the sound of a distant locomotive while camping alone. Initially, Olson recalled, he was greatly disturbed at the intruding sound. But after it had passed, he reflected on the whistle as symbol of civilization. "Without that long lonesome wail and the culture that had produced it, many things would not be mine—recordings of the world's finest music, books holding the philosophy, the dreams and hopes of all mankind, a car that took me swiftly . . . whenever I felt the need." Moreover, it was ultimately civilization that made possible the appreciation of wilderness. . . . "Only through my own personal contact with civilization," Olson concluded, "had I learned to value the advantages of solitude."

NASH, *supra* note 238, at 230 (quoting SIGURD OLSON, LISTENING POINT 150-53 (1958)). Nash quotes the similar insight of an anonymous poet: "Gregarious man has a lonesome soul/And wilderness ways lead back to a crowd." *Id.* at 229 (quoting Anonymous, *Nothing More?*, in 2 LIVING WILDERNESS 24 (1946)).

neighborhood for playing ball, it might be "development" to build houses on the first, and the second, and the third, and the fourth, and even the fifth, but when we build houses on the last one, we forget what houses are for. The sixth house would not be development at all, but rather it would be mere short-sighted stupidity.<sup>273</sup>

With respect to public lands preservation, the difficulty, of course, is deciding what constitutes the sixth lot, and indeed, whether development of the first five lots is even necessary.

Suggesting that the impact of withdrawal on local communities be considered and balanced against the benefits of withdrawal should not be understood as an argument that the public lands must be managed for the benefit of local communities. That was long the approach of the Forest Service, which managed the national forests with the explicit objective of protecting the stability of surrounding resource-dependent communities,<sup>274</sup> and historically it was largely the approach of the BLM.<sup>275</sup> Instead, the consideration of impact should be understood as a focus on how those public lands deserving of protection can be preserved with the least possible negative impact on local communities. Approaches to protecting local communities<sup>276</sup> have been explored by a number of writers,<sup>277</sup> and

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273. ALDO LEOPOLD, ALDO LEOPOLD'S WILDERNESS 159 (David E. Brown & Neil B. Carmony eds., 1990).

274. See Bates, *supra* note 188, at 92-93 (outlining and discussing the Forest Service's community stability management objectives); Con H. Schallau & Richard M. Alston, *The Commitment to Community Stability: A Policy or Shibboleth?*, 17 ENVTL. L. 429, 434-50 (1987) (discussing history of community stability policy under Forest Service); see also Sustained Yield Forest Management Act of 1944, ch. 146, § 1, 58 Stat. 132 (stating its purpose to "promote the stability of forest industries, of employment, of communities, and of taxable forest wealth, through continuous supply of timber").

275. See generally George Cameron Coggins & Margaret Lindeberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1, 41-100 (1982) (discussing the history of rangeland management).

276. Although the article uses the term "community" in its geographic and political sense as referring to those towns and counties in close proximity to the public lands to be withdrawn, the term "community" is capable of broader definition. See Bates, *supra* note 188, at 82-85 (1993) (identifying a variety of different public lands communities, including geographic communities and communities defined by a shared sense of identity).

277. See, e.g., Diane M. Dale, *The Boundary Dilemma at Shenandoah National Park*, 16 VA. ENVTL. L.J. 607, 608-14 (1997) (reviewing the creation of Shenandoah National Park and the forced removal of park land inhabitants); Joseph L. Sax, *Understanding Transfers: Community Rights and the Privatization of Water*, 1 WEST-

by Congress, which, for example, has passed legislation providing rural communities disadvantaged by National Forest management decisions with financial and technical assistance to aid in the diversification of their economies.<sup>278</sup> A thorough examination of potential strategies for protecting local communities is beyond the scope of this article. But the one theme common to the approaches for easing the blow suffered by local communities from public land management decisions is that the community and its interests should at the very least be included in the decision-making process.<sup>279</sup>

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N.W. 13 (1994) (discussing the need to recognize community interests in water transfers); Bates, *supra* note 188; Joseph L. Sax, *The Trampas File*, 84 MICH. L. REV. 1389 (1986) (setting forth a proposal by the New Mexico Society of Architects that the northern New Mexican village of Las Trampas be incorporated into the national park system and setting forth competing viewpoints); Joseph L. Sax, *Do Communities Have Rights? The National Parks as A Laboratory of New Ideas*, 45 U. PITT. L. REV. 499 (1984) (raising a number of provocative questions about preservation of agricultural village of Boxley Valley within the Buffalo National River unit of the National Park System); Daniel S. Reimer, Comment, *The Role of "Community" in the Pacific Northwest Logging Debate*, 66 U. COLO. L. REV. 223 (1995) (describing the "unique" Northwest logging community and suggesting the necessity of including that community in the forest policy dialogue); *see also* Schallau & Alston, *supra* note 274, at 429 n.1 ("There is, perhaps, no more sensitive issue for public land administering agencies to consider than how management decisions affect people who live near or are dependent on resource-based activities." (citation omitted)).

278. *See* National Forest-Dependent Rural Communities Economic Diversification Act of 1990, Pub. L. No. 101-624, § 2371, 104 Stat. 3359 (codified at 7 U.S.C. § 6611 (1994)); Bates, *supra* note 188, at 99-100 (discussing this legislation and other legislation designed to assist rural communities in transition from a resource dependent economy); *see also id.* at 97-98 (describing the Community Stability Act of 1991 which was never enacted but which would have "required federal land planning to consider outputs, demands, employment, and local government receipts, and would have restricted reductions in public land outputs greater than ten percent below the average output for the previous five years"); *id.* at 98 (describing Northwest Forest Protection and Community Stability Act of 1991, H.R. 3263, 102nd Cong., which was not enacted but which would have aided the economic transition of resource-dependent communities by providing federal grants); Schallau & Alston, *supra* note 274, at 452-66 (reviewing public land legislation addressing community stability).

279. *See, e.g.,* Dale, *supra* note 277 (calling for cooperative land planning efforts); Reimer, *supra* note 277, at 241-42 (arguing that under principles of group autonomy Northwest timber communities should have the right to participate in decisions that affect their future); Bates, *supra* note 188, at 104-11 (advocating broad community involvement in land management decisions). *See generally* Symposium, *The Ecosystem Approach: New Departures for Land and Water: Practical Legal Issues for Community Initiated Ecosystem Management of Public Lands*, 24 ECOLOGY L.Q. iii, 745-97 (1997); Timothy P. Duane, *Community Participation in Ecosystem Management*, 24 ECOLOGY L.Q. 771 (1997) (investigating the Quincy Library Group forest management plan).



Despite the general agreement on the virtue of considering impact on local communities as part of the withdrawal process, the Clinton Administration gave little heed to the communities surrounding the Monument. The chase was secondary to the capture. Although it drew boundary lines to exclude the local communities, it did little else prior to the Monument's creation to involve the communities. No public hearings were held. No input was sought from state and local government officials. And no guidance from local federal land managers was sought.<sup>280</sup>

Ignoring the communities had predictable results. On the technical level, a number of clumsy boundary errors resulted.<sup>281</sup> More significantly, the communities' sense of alienation from the federal government and relative sense of helplessness at controlling their destinies were severely exacerbated.<sup>282</sup> Most predictable of all, supporters of the Monument in the local communities were very few.<sup>283</sup>

Since designation of the Monument, the Administration has done much more to address the impact on the local communities and win them over to the Monument. It has offered funding to Kane and Garfield counties for planning in conjunction with the Monument.<sup>284</sup> The BLM has sought broad input in its

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280. See 143 CONG. REC. S2563 (daily ed. Mar. 19, 1997) (statement of Sen. Hatch: "Without any notification, let alone consultation or negotiation, with our Governor or State officials in Utah, the President set aside this acreage . . . . There was no consultation, no hearings, no town meetings, no TV or radio discussion shows, no nothing."). The Administration did, however, consult with two Utah ecologists employed by the United States Geological Survey regarding monument boundaries and did consider local community impact in rejecting the ecologists' suggestion that the monument be extended 30 miles westward to link up with Zion National Park. See Jim Woolf, *Experts Envisioned a Staircase to Zion*, SALT LAKE TRIB., Feb. 26, 1998, at A1. Secretary Babbitt believed that such an extension was likely to make "the monument even more unpopular to people in Kanab and [in] nearby communities along U.S. 89." *Id.* The Administration's primary consultations, however, were with certain environmentalists and Democratic party politicians in the West. See *supra* notes 5, 125.

281. For example, the boundaries encompassed a producing oil field, acreage where one town had planned to expand its high school athletic field, the wells and water storage facilities of another town, and part of one property owner's driveway to his ranch. See Lee Davidson, *Measure Calls for Changes in Staircase Boundaries*, DESERET NEWS, June 7, 1998, at A22.

282. See *supra* note 8 (newspaper articles revealing frustration and alienation of the local communities).

283. See *supra* notes 7-8 and accompanying text (describing local opposition to the Monument).

284. Kane County accepted some \$200,000 in federal money. See Paul Larmer,

preparation of a management plan for the Monument.<sup>285</sup> And as discussed above, Secretary Babbitt and Governor Leavitt negotiated the exchange of federal land elsewhere in Utah for state school trust lands within the Monument.<sup>286</sup> These post-designation efforts should help ease the sting of the lack of pre-designation process, but they are a poor substitute. Because of the inertia engendered by an existing proclamation, foregoing community involvement until after designation makes it more likely that reasonable community needs will not be met. It also ensures the sort of acrimony and alienation that make cooperative management particularly difficult. But even if including the community in the designation process had no demonstrable benefits, it would be the right thing. Careful deliberation does not always yield fruit and sometimes hasty mistakes can be repaired by subsequent action, but that does not mean that deliberation is not wise, or indeed virtuous.

Why in the case of the Grand Staircase did the Clinton Administration fail to involve the local communities in considering the potential impact on them? Presumably because under the Antiquities Act it was not obligated to do so. Withdrawal decisions typically require consideration of the interests of local communities. FLPMA's withdrawal provisions require the Secretary of the Interior to publish notice of any proposed withdrawal, conduct public hearings, and consult with local government bodies.<sup>287</sup> Along with the notice, the Secretary

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*Beauty and the Beast*, HIGH COUNTRY NEWS, Apr. 14, 1997, at 8. Of that amount, \$100,000 had been offered to Garfield County but refused as "blood money." *Id.*

285. See Bureau of Land Management, *How You Can Participate in Planning for the Monument* (visited July 18, 1998) <<http://www.blm.gov/nhp/news/alerts/EsclPubPart.html>> (describing public involvement process); see also Keiter, *supra* note 143, at 92-93 (describing Monument planning process).

286. See *supra* Part II.C. This exchange presumably will be of greater benefit to SITLA than it will be to those counties who lost school trust lands in the exchange.

287. See 43 U.S.C. § 1714(b)(1) (1994) (requiring publication of notice in federal register); *id.* § 1714(c)(2)(7) (requiring consultation with "local government bodies, and with other appropriate individuals and groups"); *id.* § 1714(h) (requiring a public hearing). For a more thorough overview of FLPMA's withdrawal procedures, see *supra* note 80 and *infra* note 288. The Wilderness Act also provides for public notice and public hearings in the areas in the vicinity of the affected land. See 16 U.S.C. § 1132(d)(1)(A), (B) (1994). NEPA also potentially requires some concern for impact on local communities in its commitment to preserving "important historic, cultural, and natural aspects of our national heritage." 42 U.S.C. § 4331(b)(4) (1994) (emphasis added); see also 40 C.F.R. § 1502.16(g) (1997) (listing among consequences of agency action to be considered "[u]rban quality, historic and cultural resources, and the design of the built environment"); 40 C.F.R. § 1508.27(b)(8) (1997) (a finding

must furnish Congress a detailed report on the proposed withdrawal, a significant portion of which must address the withdrawal's impact on local communities.<sup>288</sup> The Antiquities Act, of course, is different. Just as it requires no public notice, it requires no consideration of local impact.<sup>289</sup> If consideration of impact on local communities is truly an important principle of a fair withdrawal process, the question posed earlier is presented again: should the Antiquities Act be amended or repealed? It is to that issue that the article now turns.

#### *D. Amending the Antiquities Act in Keeping with Wilderness Virtues*

One of the clear lessons of the Grand Staircase designation process is that it is time for a legislative change. As discussed in

of "significance" depends in part upon adverse impact on cultural or historical resources). Generally, however, the impact on "culture" will not include socio-economic impacts on a local community. See 7 C.F.R. § 3100.42 (1997) (defining "cultural resources" as "the remains or records of districts, sites, structures, buildings, networks, neighborhoods, objects, and events from the past").

288. See 43 U.S.C. § 1714(c)(2) (1994). The report requires the Secretary to address twelve different issues, among which are the following:

(2) an inventory and evaluation of the current natural resource uses and values of the site and adjacent public and nonpublic land and how it appears they will be affected by the proposed use, including particularly aspects of use that might cause degradation of the environment, and also the economic impact of the change in use on individuals, *local communities*, and the Nation;

(3) an identification of present users of the land involved, and how they will be affected by the proposed use;

(4) an analysis of the manner in which existing and potential resource uses are incompatible with or in conflict with the proposed use, together with a statement of the provisions to be made for continuation or termination of existing uses, including an economic analysis of such continuation or termination . . . .

(6) a statement as to whether any suitable alternative sites are available (including cost estimates) for the proposed use or for uses such a withdrawal would displace;

(7) a statement of the consultation which has been or will be had with other Federal departments and agencies, with regional, State, and *local government bodies*, and with other appropriate individuals and groups;

(8) a statement indicating the effect of the proposed uses, if any, on State and *local government interests and the regional economy*;

(10) the time and place of hearings and of other public involvement concerning such withdrawal;

(11) the place where the records on the withdrawal can be examined by interested parties.

*Id.* § 1714(c) (emphasis added).

289. See 16 U.S.C. § 431 (1994).

Part II.D, in the wake of the designation, four bills<sup>290</sup> were introduced in Congress seeking either to eliminate<sup>291</sup> or severely limit<sup>292</sup> the President's authority to proclaim a national monument, and to revest the authority to create national monuments primarily with Congress. The approach of these bills has much to recommend it. It is consonant with the Constitution's provision that Congress, and not the executive branch, "shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>293</sup> It more closely adheres to the FLPMA withdrawal process, which generally governs the withdrawal of public lands.<sup>294</sup> And the bills would increase the fairness of the national monument withdrawal process by providing opportunities for public participation and consideration of local community impacts.<sup>295</sup>

Balanced against these benefits is the unfortunate reality that if the President's withdrawal power were repealed, protective withdrawal of public lands would likely decline.<sup>296</sup> The reason is

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290. See *supra* Part II.D (discussing legislation emanating from the designation).

291. See S. 691, 105th Cong. (1997) (providing that "a recommendation of the President for declaration of a national monument shall become effective only if so provided by an Act of Congress"); H.R. 596, 105th Cong. (1997) (requiring an act of Congress for any national monument).

292. See *supra* notes 229-31 and accompanying text (describing bills of Sen. Hatch and Rep. Hansen, which respectively require an act of Congress to establish any national monument of more than 5000 or 50,000 acres).

293. U.S. CONST. art. IV, § 3, cl. 2. For an argument in favor of repealing the Antiquities Act, see Johannsen, *supra* note 77 (contending that the act should be amended consonant with the land withdrawal policies articulated in FLPMA).

294. See *supra* notes 287-88 (discussing FLPMA withdrawal process). For an argument in favor of repealing the Antiquities Act, largely because it violates FLPMA's basic withdrawal approach, see Johannsen, *supra* note 77, at 457-65. See also Shepherd, *supra* note 78, at 4-39 to 4-42 (articulating a number of arguments for repeal of the Antiquities Act).

295. The bills proposed by the Utah congressional delegation do not explicitly provide for public participation or consideration of impacts on local communities. They require only that the Secretary of the Interior consult with and obtain written comments from the governor of the state in which the monument is to be located. See H.R. 1127, 105th Cong. (1997); S. 477, 105th Cong. (1997). Plainly, the governor is more likely to understand and consider local interests but there is no express requirement of public participation. The bill of Senator Murkowski, by contrast, explicitly requires the Secretary of the Interior to provide opportunities for public involvement and to comply "with all applicable federal land management and environmental statutes." S. 691, 105th Cong. (1997).

296. See generally Getches, *supra* note 77 (discussing vast amount of public lands afforded protected status by executive action).

fairly obvious. A President's use of the Antiquities Act can be thwarted only if congressional opponents are able to move a bill through Congress, overcoming potentially antagonistic committee chairmen who could bottle-up the bill and procedural obstacles like Senate cloture rules, and then obtaining the super-majority necessary to override the likely presidential veto. By contrast, if a particular representative in Congress has the same preservation intention, the very procedural barriers that protect the President's withdrawal from repeal become hurdles that the representative potentially must overcome.

For those of us who prefer more preservation of the public lands, the obvious impact of repealing the Antiquities Act makes it tempting to defend the status quo, to argue that the Act should abide unamended and frequently employed.<sup>297</sup> But defending the Act is an uncomfortable task because, as discussed, to defend the Act's failure to provide for public participation and consideration of impact on local communities is, in some measure, to betray basic wilderness values of sportsmanship and sensitivity to impact. Defending an act whose primary value is as a tool to circumvent Congress and its panoply of procedural obstacles is also troubling when weighed against analogous wilderness values.

As mentioned, included in the general principle that it is method, not conquest, which ennobles wilderness endeavors, is Leopold's insight that as "tools for the pursuit of wildlife improve faster than we do," the sportsman should make "a voluntary limitation in the use of these armaments . . . aimed to augment the role of skill and shrink the role of gadgets in the pursuit of wild things."<sup>298</sup> Other preservation and recreation literature widely echoes the point that patient reliance on woodcraft elevates wilderness ventures, whereas over reliance on technological advantage diminishes their value.<sup>299</sup>

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297. See, e.g., 143 CONG. REC. H8282-84 (Oct. 1, 1997) (comments of Reps. Miller and Hinchey in opposition to H.R. 1127, which propose amendment of Antiquities Act); H.R. REP. NO. 105-191, at 9-10 (1997) (dissenting views on H.R. 1127); Shepherd, *supra* note 78, at 4-39 n.195 (discussing opposition to amendment or repeal of Antiquities Act).

298. LEOPOLD, *supra* note 234, at 212; see *supra* notes 245-46 and accompanying text (discussing this issue).

299. See, e.g., ABBEY, *supra* note 14, at 14 ("There's another disadvantage to the use of the flashlight: like many other mechanical gadgets it tends to separate a man from the world around him."); FROME, *supra* note 35, at 102 ("Even the best

Participation in the democratic process can be understood as a type of woodcraft. Pushing a preservation bill through Congress is not an easy task. It requires careful planning, committed sponsorship, navigation of procedural pitfalls, persuasive and thoughtful advocacy, and, more often than not, compromise. For these reasons, the legislative tool is not particularly efficient and sometimes does not work, although its efficiency and efficacy do increase with the experience and persuasive ability of the wielder. If democracy can be analogized to woodcraft, then the discomfort with the Antiquities Act is that it seems something like a wilderness acquisition gadget. Because the woodcraft of legislation is arduous and the results may not be as dramatic, we turn to the Antiquities Act for surer satisfaction. The unfortunate irony is that by doing so, the satisfaction of preservation advocacy is actually diminished because it loses some of its nobility. Doing the hard legislative work of persuasion to "the preservationist position" is surely more ennobling than conscription, even if one is convinced that the conscript will ultimately benefit from his baptism into what Sax calls the "secular religion" of preservation.<sup>300</sup>

Championing the Antiquities Act thus feels vaguely like championing the gadgeteer, of whom Leopold wrote: "[T]he gadgeteer, otherwise known as the sporting-goods dealer . . . has draped the American outdoorsman with an infinity of contraptions, all offered as aids to self-reliance, hardihood, woodcraft or marksmanship, but too often functioning as substitutes for them."<sup>301</sup> Sax illustrates this idea of illusory wilderness experiences in his discussion of the commercial rafting company that plays on our aspirations for independence and self-reliance by proposing to take us where John Wesley Powell once traveled, but promises to do so with all of the luxuries of a resort—fine meals, portable toilets, and river guide valets to carry

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intentioned of hikers tend to be more concerned with the brand of their backpacks, boots, and sleeping bags than with the pleasures of the trail. Keeping the equipment simple helps achieve harmony with nature's rhythm and identification with wild places. There is no better goal in wilderness recreation.").

300. See SAX, *supra* note 16, at 14 (describing the "preservationist position"); *id.* at 15 (describing the preservationist as "a prophet for a kind of secular religion"). Sax embraces the quasi-religious aspect of preservation: "The preservationist is not an elitist who wants to exclude others, notwithstanding popular opinion to the contrary; he is a moralist who wants to convert them." *Id.* at 14.

301. LEOPOLD, *supra* note 234, at 214.

our gear.<sup>302</sup> The *United States Forest Service Manual* likewise explains the development of modern campsites to "satisfy the urbanite's need for compensating experiences and relative solitude" while ensuring that it will be "obvious to the user that he is in a secure situation where ample provision is made for his personal comfort and he will not be called upon to use undeveloped skills."<sup>303</sup> Of course, there is little dispute that the commercial rafting excursion and the night in the amenity-filled campground are pleasurable experiences. The point is that without some actual, as opposed to illusory, sacrifice of security and comfort, the experience only pleases the participant, but does not ennoble him. Preservationists should not turn to the Antiquities Act as a substitute for the harder task of legislation simply because the Act insures security from poor legislative choices and does not call upon them to use their still-developing skills in the woodcraft of democracy. When they do so, the result—preservation—is surely pleasing, but it is unfortunately robbed of much of its nobility.

If the Antiquities Act is a dubious gadget, does that mean that preservationists must swallow hard, agree that public lands protection must withstand the crucible of the legislative process, and sign onto one of the current legislative reform efforts? This is a difficult question. In contemplating the answer, it is important to recognize that avoiding gadgetry, and indeed the entire ethic of sportsmanship, is a virtue that lies along a mean.<sup>304</sup> Thoughtful wilderness literature does not advocate absolute abstention from gadgets, complete elimination of impact, or total unimportance of the capture.<sup>305</sup> As Leopold wrote: "I do

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302. See SAX, *supra* note 16, at 94-98; see also ROOSEVELT, *supra* note 242, at 449 (extolling the virtue of wilderness hunting and remarking that "[s]hooting in a private game preserve is but a dismal parody; the manliest and healthiest features of the sport are lost with the change of conditions").

303. SAX, *supra* note 16, at 99-100 (discussing how the *United States Forest Service Manual* proposes an illusory wilderness experience). As Sax suggests, there is an unfortunate "commercial readiness to take an idea full of one kind of associational quality—an idea like wilderness—and to deprive it in practice of all the authentic quality that generates the association, to tame it, as Thoreau would have said." *Id.* at 97.

304. For a discussion of the concept of how virtuous action lies along a mean between the vices of excess and deficiency, see ARISTOTLE, *THE NICOMACHEAN ETHICS* bk. II, ch. 6, at 1106a16 to 1110a28 (Terence Irwin trans., Hackett Publishing Co. 1985).

305. A few enthusiasts do in fact take this sort of extreme view of man's interaction with wilderness. A witty review of such viewpoints is Jack Hitt, *Is*

not pretend to know what is moderation, or where the line is between legitimate and illegitimate gadgets. . . . Yet there must be some limit beyond which money-bought aids to sport destroy the cultural value of sport."<sup>306</sup> The question with gadgetry then is not so much whether to use gadgets, but what sort and how.

Translated into the Antiquities Act context, the first question is whether the Act is the sort of gadget that so devalues the ennobling qualities of a fair and democratic preservation process that it must be amended or repealed. As suggested by the discussion above, the answer is yes. To insure a fair process, the Act needs to be amended to require public participation in the withdrawal process and mandate explicit consideration of impact on local communities. Both tasks could be accomplished by following the approach of section 204 of FLPMA and incorporating into the Act notice, hearing, and consultation requirements, as well as an obligation to study and evaluate local impacts.<sup>307</sup> Amendment of the Act along these lines would not diminish the President's withdrawal power. It would only require that the power be exercised in a more virtuous manner, consistent with basic wilderness values.

The tougher issue is whether the President's unilateral withdrawal authority must also be repealed to insure a fair and

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*Anything OK Anymore?*, OUTSIDE, Dec. 1996, at 110 (reviewing injunctions to bodysurfers to tread water at all times to avoid stepping on the organisms in the sand below, to backpackers to wear soft shoes and clothes that blend with the landscape, and to fishermen to cut the barbs from their hooks and practice a new philosophy of "Touch and Go"). In general, however, wilderness writers recognize that choices about impact and gadgetry are difficult and always involve line-drawing. See, e.g., FROME, *supra* note 35, at 102 (recognizing that "[k]eeping the equipment simple" is the highest "goal" of wilderness recreation); see also *supra* notes 270-73 and accompanying text (discussing necessary tension between civilization and wilderness); *infra* note 329 (discussing how our wilderness endeavors often fall short of the virtuous ideals we set for ourselves).

306. LEOPOLD, *supra* note 234, at 215-16; see also *id.* at 215 (noting that where line-drawing is necessary: "The answer is not a simple one. Roosevelt did not disdain the modern rifle; White used freely the aluminum pot, the silk tent, dehydrated foods. Somehow they used mechanical aids, in moderation, without being used by them."); cf. ARISTOTLE, *supra* note 304, at 1109a24 ("[I]t is hard work to be excellent, since in each case it is hard work to find what is intermediate.").

307. See 43 U.S.C. § 1714(b), (c) (1994); see also *supra* notes 287-88 and accompanying text (discussing FLPMA's withdrawal provisions in more detail). A similar approach is contained in Senator Murkowski's proposed amendment to the Antiquities Act. See Public Land Management Participation Act of 1997, S. 691, 105th Cong. § 3 (requiring public participation, mineral surveys, and compliance with all applicable federal land management and environmental statutes).



democratic withdrawal process. I suggested earlier that employing the Act to circumvent the legislative process devalued the preservation accomplishment because it ignored the woodcraft of democracy. To this observation, some might respond that the Act is not anti-democratic at all. The President is the only official elected by the owner of the public lands, the people collectively. And the President is only exercising a power that was delegated to him by Congress.<sup>308</sup> The first point has some force but is ultimately unpersuasive because the Constitution, the people's founding document, gives control over the public lands to Congress.<sup>309</sup> With respect to the second point, the idea that the Antiquities Act is a product of legislative woodcraft because it is a congressional delegation is merely a pleasing illusion. As explained above, the interpretation of the Antiquities Act adopted by the President and the courts is rather far removed from the Act's original purpose of protecting prehistoric ruins and Indian artifacts.<sup>310</sup> Thus, it is hard to argue that Congress has really delegated to the President the type of broad withdrawal authority exercised, for example, in the Grand Staircase designation.<sup>311</sup> In

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308. See *supra* note 149 (discussing the delegation doctrine).

309. See U.S. CONST. art. IV, § 3, cl. 2 (Property Clause); see also *supra* note 77 (quoting and discussing the Property Clause).

310. See *supra* note 82 and accompanying text.

311. Perhaps one could argue that Congress has effectively delegated broad Antiquities Act authority to the President by acquiescing in a long history of presidential withdrawals whose primary purpose seems to have been to protect scenic values rather than objects of historic and scientific interest. See *supra* notes 84-86 and accompanying text (discussing this history). Although this may be an accurate description of the judicial affirmation of prior withdrawals, see, e.g., *United States v. Midwest Oil Co.*, 236 U.S. 459 (1915) (affirming executive withdrawal on the basis of congressional acquiescence), it is not a persuasive argument. Equating an absence of congressional repeal with an affirmative delegation ignores the fact that any repealing legislation must overcome procedural hurdles in Congress as well as a potential presidential veto. Thus, even though a majority of Congress may disagree with a broad interpretation of the Antiquities Act, they may not be able to amend the Act. As Justice Scalia once put it:

[O]ne must ignore rudimentary principles of political science to draw any conclusions regarding that intent from the *failure* to enact legislation. The "complicated check on legislation," The Federalist No. 62, erected by our Constitution creates an inertia that makes it impossible to assert with any degree of assurance that congressional failure to act represents (1) approval of the status quo, as opposed to (2) inability to agree upon how to alter the status quo, (3) unawareness of the status quo, (4) indifference to the status quo, or even (5) political cowardice.

*Johnson v. Transportation Agency*, 480 U.S. 616, 671-72 (1987) (Scalia, J., dissenting) (internal citation omitted) (emphasis added); see also *supra* text accompanying notes 296-97 (discussing the procedural hurdles in Congress).

the absence of an express delegation, using the Act for large, scenic designations does eschew the harder woodcraft of real legislative approval in favor of an illusory delegation.

Despite the problems with these two arguments, it is difficult to abandon the Antiquities Act's unilateral executive withdrawal authority because it has been such a powerful force for preservation.<sup>312</sup> There is one approach that not only would achieve a more virtuous and democratic process but also would continue the historic use of the Act to accomplish preservation. Congress could amend the Act to provide for public participation and consideration of impact, but then explicitly delegate to the President the sort of broad, unilateral withdrawal authority exercised in the Grand Staircase designation. Like Odysseus tying himself to the mast so that he would not respond to the sirens' song,<sup>313</sup> Congress, by enacting such an amendment, would limit its ability to respond to the call of the powerful development constituency by interposing the procedural hurdles of the legislative process in the way of development rather than in the way of preservation.<sup>314</sup> So amended, the Antiquities Act would represent a noble illustration of legislative woodcraft in the interest of preservation rather than the current unsatisfying illusion of delegated authority.

The difficulty with this approach is its political viability. For Congress to delegate fully and specifically to the President the broad withdrawal authority exercised in the Grand Staircase designation, it would need to amend the current language of the Antiquities Act, which provides for land to be withdrawn because it contains "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest,"<sup>315</sup> but not simply because it possesses scenic beauty. Allowing the President to make unilateral withdrawals for scenic purposes also would effectively eviscerate the FLPMA withdrawal process,

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312. See *supra* notes 84-86 and accompanying text (discussing the preservation accomplishments of the Antiquities Act).

313. See HOMER, *THE ODYSSEY* 151-52 (E.V. Rieu trans., The Chaucer Press, 1946).

314. See *supra* notes 311 and text accompanying notes 296-97 (discussing the procedural obstacles in the legislative process). The biggest procedural hurdle, of course, would be the presidential veto, which has the salutary effect of imposing on Congress a super-majority requirement before it may dispose of the nation's natural resources.

315. 16 U.S.C. § 431 (1994).

which is hardly a legislative likelihood. Perhaps a more politically realistic approach would borrow from that of Representative Hansen of Utah, who has proposed that the President retain unilateral withdrawal authority for withdrawals of up to 50,000 acres.<sup>316</sup> This approach would not necessitate amendment of the Antiquities Act to include scenic designations because protection of "landmarks," "structures," and "objects" could presumably require a 50,000 acre designation. This approach would thus diminish the disquieting reliance on an illusory delegation while still giving some boost to preservation.

In the end, the political reality is that amendment of the Antiquities Act appears as unlikely now<sup>317</sup> as it has been historically.<sup>318</sup> Accordingly, instead of asking what sort of Antiquities Act would be best, it may be more productive to turn to the second question of how the Antiquities Act gadget, and more broadly how the tools of preservation advocacy, should be employed.<sup>319</sup>

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316. See H.R. 1127, 105th Cong. (1997); see also *supra* notes 228-31 and accompanying text (discussing this legislation). The President is limited to 50,000 acres per state per year. See *id.* The bill does not require public participation or consideration of local impact for designations under 50,000 acres, although it does require consultation with the governor of the affected state for proposals greater than 50,000 acres. See *supra* note 231 (discussing this provision). The absence of public participation and impact consideration is not something that should be borrowed from the approach of Representative Hansen.

317. Representative Hansen's bill did pass the House, but not by a veto-proof majority, see 143 CONG. REC. H8502 (Oct. 7, 1997) (229 yeas and 197 nays), and Senator Hatch's bill remains in committee.

318. See *supra* notes 217-18 and accompanying text (discussing previous efforts to amend Antiquities Act).

319. Another gadget of preservation advocacy that must be employed with care is litigation. Just as the sporting goods dealers have "draped the American outdoorsman with an infinity of contraptions," LEOPOLD, *supra* note 234, at 214, the last 30 years have seen preservationists equipped with a number of new tools to prevent development and promote protection of the public lands. See, e.g., NEPA, 42 U.S.C. §§ 4321-4361 (1994); Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1994). With that growth comes a responsibility to employ those tools with restraint and for a proper purpose, rather than to delay or to challenge reasonable compromises or decisions. Cf. LEOPOLD, *supra* note 234, at 212 (encouraging a "voluntary restraint" on the use of gadgets). Unfortunately, preservation advocates have not always done so. Should, for example, the Southern Utah Wilderness Alliance ("SUWA") have used the NEPA tool to challenge the BLM's decision to allow Conoco to go ahead and drill on its federally-leased land within the Monument? See *supra* notes 201-04 and accompanying text (discussing this challenge). Should SUWA have been so quick to resort to this legal gadget to prevent Conoco from exercising its valid existing rights? Dubious attacks on valid existing rights seem analogous to eschewing virtuous woodcraft in favor of the quick kill or roaded,

*E. Beyond Legal Rules: Ennobling Advocacy of Public Lands Protection*

Regardless of whether the Antiquities Act is amended, nothing prevents the President from voluntarily engaging in a worthier monument withdrawal process. In fact, noncompulsory adherence to a virtuous process would enhance the nobility of the preservationist project more than obligated adherence to codified virtue. To quote Leopold again: "Voluntary adherence to an ethical code elevates the self-respect of the sportsman, but it should not be forgotten that voluntary disregard of the code degenerates and depraves him."<sup>320</sup> I would suggest that an ethical code of sorts should guide the President in the withdrawal process and preservationist advocacy more generally, just like an ethical code informs the voluntary activities of the sportsman.

Hearkening to wilderness values, one basic principle of what might also be termed a preservation advocacy ethic is that preservation activities, like wilderness activities, should avoid undue impact. Application of this virtue should lead to attempts to mitigate negative impacts of protective designations on surrounding communities.<sup>321</sup> Avoidance of undue impact likewise suggests that preservationist efforts should avoid despoliation of property rights.<sup>322</sup> Thus, voluntary adherence to an ethical code of preservation would presumably result in fewer challenges to reasonable development of valid existing rights, as occurred in the Southern Utah Wilderness Alliance's challenge to Conoco's application for a drilling permit.<sup>323</sup> Instead, it would produce

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convenient access. Plainly, the woodcraft of persuading the federal government to condemn the right, to work an exchange, or, better yet, of persuading Conoco not to develop the land, see Jim Woolf, *Southern Utah Drilling*, SALT LAKE TRIB., Mar. 28, 1997, at A1 (showing that SUWA did make this attempt with Conoco), is difficult and often unsuccessful. But that difficulty does not justify reaching for the gadget of litigation to accomplish the task. As with using the Antiquities Act, the result may be pleasing but it is not ennobling. See text accompanying notes 302-03 (discussing this dichotomy). If the chase for preservation results in despoliation of civil liberty, the capture is not worth the candle.

320. LEOPOLD, *supra* note 234, at 212.

321. See *supra* Part III.C (discussing the need to consider the impact of withdrawals on local communities).

322. See *supra* note 319 (discussing this issue).

323. See *supra* note 319 and accompanying text (discussing this dispute and the potential problem of over-reliance on the litigation "gadget"). Dubious uses of the litigation gadget are far too common. See, e.g., *Southern Utah Wilderness Alliance v. Dabney*, 7 F. Supp. 2d 1205 (D. Utah 1998) (challenge to Park Service's

increased advocacy of purchase or exchange of inheld lands, such as the plan worked out by Interior Secretary Babbitt and Utah Governor Leavitt for Utah's school trust lands<sup>324</sup> and the settlement being negotiated with Andalex.<sup>325</sup> The Administration's negotiation of purchase and exchange agreements for the New World Mine near Yellowstone National Park<sup>326</sup> and the Headwaters ancient redwood grove in California<sup>327</sup> are further

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backcountry management plan for Canyonlands National Park despite the thorough consideration given to competing uses); Wyoming Farm Bureau Fed'n v. Babbitt, 987 F. Supp. 1349 (D. Wyo. 1997) (challenge to Fish & Wildlife Service's decision to allow less protection of wolves re-introduced into Yellowstone than would generally be the case under the Endangered Species Act, even though that diminished protection had facilitated the wolves reintroduction); Lindsey Kate Shaw, Comment, *Land Use Planning at the National Parks: Canyonlands National Park and Off-Road Vehicles*, 68 U. COLO. L. REV. 795 (1997) (discussing compromise necessary to planning process). Of course, examples of such a lack of restraint are just as evident in the service of development. See, e.g., *Wyoming Farm Bureau Fed'n*, 987 F. Supp. at 1355-56 (farmers' challenge to reintroduction of wolves into Yellowstone on several grounds, including the argument that the government had not adequately considered the farmers' comments); Michelle Nijhuis, *Oil Clashes with Elk in the Book Cliffs*, HIGH COUNTRY NEWS, Apr. 13, 1998, at 1 (describing Oscar Wyatt's challenge to an initiative which would have reduced grazing in Utah's Book Cliffs in favor of an increased Elk herd). Regardless of one's side in the development versus preservation debate, the gadget of litigation should not be valued over the woodcraft of persuasion and negotiation.

324. See *supra* Part II.C (discussing the exchange).

325. See *supra* note 193 and accompanying text (discussing this negotiation).

326. The New World Mine exchange arose out of a plan by Noranda, a Canadian mining company, to extract an estimated \$800 million in gold, silver and copper from Forest Service lands upstream from Yellowstone National Park, the Wild and Scenic Clarks Fork of the Yellowstone River, and the Absaroka-Beartooth Wilderness. See Bob Ekey, *The New World Agreement: A Call for Reform of the 1872 Mining Law*, 18 PUB. LAND & RESOURCES L. REV. 151, 152 (1997). Responding to significant opposition to the potential environmental hazards posed by the mine, Noranda and its subsidiary, Crowne Butte, agreed to a land swap authored by the Greater Yellowstone Coalition and endorsed by the Clinton Administration to trade all of its claims in the New World Mine District, covenant not to pursue future mining in the area, and to establish a \$22.5 million escrow account to be applied towards cleanup of existing pollution in the area in return for an anticipated \$65 million worth of federal lands and the settlement of pending and future litigation related to the mine. See *id.* at 159-60; see also Murray D. Feldman, *The New Public Land Exchanges: Trading Development Rights in One Area for Public Resources in Another*, 43 ROCKY MTN. MIN. L. INST. 2-1, 2-16 to 2-18 (1997) (discussing the deal and other Administration efforts to use land exchanges to protect sensitive areas). Congress appropriated the money from the Land and Water Conservation Fund and the President signed the deal into law on November 20, 1997. See Pub. L. No. 105-83, § 502, 111 Stat. 1543, 1614-15 (1997); *Clinton Signs Money Bill; Vetoes New World Mine Transfer*, PUB. LANDS NEWS, Nov. 27, 1997, at 1.

327. The Headwaters grove exchange grew out of concerns over the logging of what was the largest old-growth stand of coastal redwoods in private hands. See Feldman, *supra* note 326, at 2-24. In 1996, Pacific Lumber, which had previously

examples of how this aspect of a preservation ethic could operate in practice, as is the willingness to use the Land and Water Conservation Fund for these and other acquisitions.<sup>328</sup>

Admittedly, because the virtues in such an ethical code exist along a mean, it is difficult to calibrate the point at which efforts to prevent use of, or access to, valid existing rights become inappropriate or how generous the federal government should be in purchase or exchange negotiations.<sup>329</sup> With respect to the last

been enjoined from harvesting because parts of the forest were critical habitat for the endangered Marbled Murrelet, *see* Marbled Murrelet v. Babbitt, 83 F.3d 1060 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 942 (1997), began threatening to "salvage log" the trees in the Headwaters forest and also initiated a takings claim, arguing that the government had effectively turned its forest into a wildlife preserve. *See* Ryan Lizza, *Gold Diggers: How Developers Mine the Government*, NEW REPUBLIC, May 4, 1998, at 17. In response to public outcry over the threatened logging and the fear that Pacific Lumber's takings claim might succeed, the Interior Department and the State of California negotiated an agreement to buy the Headwaters and other forest tracts for \$380 million. *See id.*; *see also* Feldman, *supra* note 326, at 2-25. *But see* Lizza, *supra* at 17 (observing that critics of the deal claimed that the price was much too high and accused Pacific Lumber of "environmental extortion"). In the same legislation as the New World mine deal, *see supra* note 326 (discussing the legislation), Congress appropriated \$250 million from the Land and Water Conservation Fund toward acquisition of the Headwaters forest. *See* Pub. L. No. 105-83, § 501, 111 Stat. 1543, 1610-11 (1997); *Clinton Signs Money Bill; Vetoes New World Mine Transfer*, *supra* note 324; William Booth, *Calif., U.S. to Pay \$495 Million for Ancient Redwood Grove*, WASH. POST, Sept. 2, 1998, at A3 (discussing California's approval of purchase). The acquisition will become effective after the Interior Department prepares an EIS for a habitat conservation plan. *See id.*

328. *See* Land and Water Conservation Fund Act of 1965, 16 U.S.C. §§ 460l-4 to 460l-11 (1994). The Land and Water Conservation Fund ("LCWF") is the primary funding source for federal purchases of land for recreation and wildlife purposes. *See generally* COGGINS & GLICKSMAN, *supra* note 19, § 10C.06 (discussing federal land reacquisition and the LCWF). It is funded primarily by revenues from federal offshore oil and gas leasing revenues. *See id.* Congress must authorize use of the funds and, unfortunately, for many years spending has been far below authorized levels. *See id.*; *see also* Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 18 n.82 (1997) ("If all revenues nominally credited to the Fund are counted, its accumulated unexpended (because unappropriated) surplus now exceeds \$10 billion." (citing *Congressional Research Serv., Land and Water Conservation Fund: Current Funding* (visited Sept. 12, 1997) <<http://www.cnle.org/nle/nrgen-1.html>>)). The LCWF was used to fund the Headwaters and New World Mine purchases. *See House and Senate Reach New World, Headwaters Agreements*, PUBLIC LANDS NEWS, Oct. 30, 1997, at 5. And it will be used to fund a number of other purposes under the budget deal President Clinton struck with Congress in 1997. *See id.*; *see also* *White House Fact Sheet on Land, Water Conservation Fund*, U.S. NEWSWIRE, Feb. 2, 1998 (press release discussing LCWF acquisitions in Clinton Administration's proposed 1998 budget).

329. *See supra* notes 304-06 and accompanying text (discussing how wilderness virtues lie along a mean). Of course, not only do wilderness virtues lie along a mean but also they are in some measure aspirational. Our wilderness endeavors often fall

question, perhaps the best example of an appropriate ethic is President Clinton's decision in negotiating the exchange of school lands within the Grand Staircase that "reasonable differences in valuation" would be resolved "in favor of the school trust."<sup>330</sup> Likewise, in deciding whether to challenge use of a valid existing right, reasonable differences should again be resolved "in favor" of the right. The principle is that avoiding despoliation of property rights should be understood as an ethical, and not just a constitutional,<sup>331</sup> obligation.

In the end, the overarching principle of a preservation advocacy ethic is that the "chase" for preservation is just as important, if not more important, than its "capture." Achieving preservation should not come at the expense of a fair process. With this in mind, the President should seek to include the public and preservationists should advocate public inclusion in monument withdrawal decisions, even though not required by the Antiquities Act.<sup>332</sup> More generally, this primary principle

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short of the ideals we set for ourselves. See, e.g., FROME, *supra* note 35, at 102 ("Even the best intentioned of hikers tend to be more concerned with the brand of their backpacks, boots, and sleeping bags than with the pleasures of the trail."); SAX, *supra* note 16, at 37 (discussing tension in climbing literature between the aspiration of purist climbing techniques and the drive to summit at any cost). But to admit that virtuous habits are not easy to come by is not to say that they are pointless. Knowledge of basic wilderness virtues should motivate us to refine our behavior and, at very least, cause us to ask whether there is a better way, whether an activity could be accomplished with less impact, whether we are substituting gadgetry for woodcraft, and whether our motives are appropriate. See, e.g., ALDO LEOPOLD, *THE ROUND RIVER* 155 (Oxford University Press 1953) ("We shall never achieve harmony with [the] land, any more than we shall achieve justice or liberty for people. In these higher aspirations the important thing is not to achieve, but to strive."); see also JOSEPH WOOD KRUTCH, *THE BEST NATURE WRITING OF JOSEPH WOOD KRUTCH* 157 (University of Utah Press 1995) (making similar point). Asking ourselves these same questions in the context of the withdrawal process and preservation advocacy would have similarly beneficial results.

330. See *President's Remarks*, *supra* note 118.

331. See U.S. CONST. amend. V (takings provision); see also *supra* note 170 (discussing takings law).

332. See *supra* Part III.B (discussing the need for public participation). Logically, application of a voluntary code of preservation ethics to the monument withdrawal process would include not only public participation, but also consideration of community impact and the other virtues discussed above that ideally would inform amendment of the Antiquities Act. In fact, voluntary adherence to a virtuous withdrawal procedure would suggest that with respect to large scenic designations like the Grand Staircase, a President should rely on FLPMA and abstain from using the Antiquities Act. Until the woodcraft of the legislative process is employed to amend the Act and make clear that Congress has delegated the authority to make such large scenic designations, using the Act will be analogous to

instructs preservationists that the nobility of the preservationist project is linked just as closely to its methods as it is to its results. When preservationists work to protect public lands by resorting to the gadgets of profligate litigation or dubious executive action instead of patiently relying on the woodcraft of persuasion, they risk becoming mere trophy hunters and conquerors, torn between a desire to trumpet their conquest and an uncomfortable knowledge of how the victory was achieved.<sup>333</sup> The protected lands become something like the collection of old world antiquities in the British Museum—one of the country's undeniable jewels, yet one that is forever tarnished by the method of its acquisition.<sup>334</sup>

#### IV. CONCLUSION

The Grand Staircase-Escalante National Monument will surely come to be regarded as one of the jewels of our national park and national monument system. It is unfortunate that the cost of that jewel was some of the nobility of the preservationist project. Ultimately, the lesson to be drawn from the Grand Staircase designation is that the wilderness values of sportsmanship, avoidance of impact, restraint, and patient reliance on woodcraft instead of powerful gadgetry are not simply quaint ideals to be applied to our interaction with wilderness. Rather, they are an expression of broader virtues that are equally applicable to the

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relying on an illusion that is pleasing but not ennobling. *See supra* notes 302-03 and accompanying text (discussing how reliance on an illusion pleases but does not ennoble); *see also supra* notes 312-16 and accompanying text (advocating amendment of the Act to expressly delegate to the President broad, unilateral withdrawal authority rather than continuing to rely on an illusory delegation). But even if one accepts the notion that Congress by its acquiescence has actually delegated such broad Antiquities Act authority to the President, *see supra* note 311 (suggesting the theoretical weakness of this delegation argument), the President should at least employ the Antiquities Act tool in a virtuous manner.

333. *See supra* note 264 (John Steinbeck's comment on this dilemma for trophy hunters).

334. For a review of the most famous dispute about the British Museum's antiquities collection, namely whether the Elgin Marbles, taken from the walls of the Parthenon, should be repatriated to Greece, *see* John H. Merryman, *Thinking About the Elgin Marbles*, 83 MICH. L. REV. 1881 (1985); T.R. Reid, *A Tug-of-War Over Damaged Greek Masterwork*, INT'L HERALD TRIB., July 31, 1998, at 2 (discussing recent developments in the debate). For a more general overview of the problems engendered by such historical decisions to remove cultural property from its country of origin, *see* John H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989).



withdrawal process and the task of preservation advocacy. Application of those virtues suggests that the Antiquities Act should be amended to provide for public participation in the withdrawal process and consideration of local community impact, and to clarify the extent of Congress's delegated withdrawal authority. In the event that the Act is not amended, adherence to these values should be the voluntary ambition of preservationists, and preservation-minded presidents, because the virtue of the project depends upon it.